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95-1398

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

TERRY ALSBERG, dba Alsberg Brothers Boatworks

Petitioner,

vs.

JEROME E. ROBERTSON

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

Did the Ninth Circuit err in determining that a debtor's homestead exemption can only be realized at the time of and from the net proceeds of an actual sale of the debtor's home, where the doctrine has always been that a single date of cleavage, the date the petition is filed, is to determine what is exempt property and what is property of the estate?

LIST OF PARTIES

The following are the parties to this proceeding:

Terry Alsberg
Debtor-Petitioner,

Jerome E. Robertson
Trustee-Respondent

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STATEMENT PURSUANT TO RULE 28.1

Terry Alsberg is an individual petitioner

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OPINIONS BELOW

The October 11, 1995 opinion of the 9th Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 68 F.3d 312 (9th Cir. 1995) and is reprinted in the Appendix to this petition at A2. The prior opinion of the 9th Circuit Bankruptcy Appellate Panel is reported at 161 B.R. 680 (9th Cir. BAP 1993) and is reprinted in the Appendix at A9. The prior opinion of the United States Bankruptcy Court, Northern District of California, entered on September 30,1992, was unreported and is reprinted in the Appendix at A18.

JURISDICTION

The decision of the 9th Circuit Court of Appeals was entered on the 11th day of September 1995 and affirmed the decision of the 9th Circuit Bankruptcy Appellate Panel. A timely filed Petition for Rehearing and Suggestion for Rehearing In Banc was denied on the 28th day of November 1995. (A1) This Court has jurisdiction pursuant to 28 USC § 1254(1).

STATUTES INVOLVED

Title 11, United States Code §§ 522(a), 522(b), 541(a), reproduced at (A31-33).

California Code of Civil Procedure § 703.140 as ammended by S.B.651, is reproduced at (A34)

STATEMENT OF THE CASE

1. INTRODUCTION

On May 29, 1987 the Petitioner, an individual debtor and sole proprietor of a boat building enterprise, filed a bankruptcy petition seeking protection under Chapter 11. On the date of filing, the value of the debtor's interest in his home did not exceed the amount of his allowed exemption under California law. The case was converted to Chapter 7 on September 28 of 1988 and a trustee was appointed. On November 1, 1988 the debtor's home was sold yielding an amount in excess of the amount of the California homestead exemption. The Ninth Circuit held that the value of the debtor's interest in his home on date of filing was irrelevant. It was the opinion of the Ninth Circuit that the California homestead exemption could only be realized from the proceeds of the sale of a bankruptcy debtor's home and that therefore the rights of the estate, the creditors, the trustee and the debtor in the otherwise exempt property were to be determined on the date of sale not the date of filing.

Petitioner contends the plain language of 11 USC §522(a)(2) requires that when value is at issue in the determination of exemption rights, that value must be the fair market value on date of filing. Petitioner further contends that, although "opt out" states under 11 USC §522(b))2)(A), may define the amount and the type of property that may be exempted, there is no provision in the Bankruptcy Code to allow states to change the effective date of exemptions from the petition date to any other date.

Petitioner lastly contends that, even if by some theory the states were allowed to change the effective date of exemptions to some other date, the plain language of the California Statute relied on by the courts below, CCP §703.140 et. seq., cannot be construed to have that effect.

II. THE FACTS

There is no dispute as to the facts. The Bankruptcy Court ruled as a finding of fact that on the date of filing, the fair market value of the debtor's interest in his home was $33,875 and that he properly claimed his homestead exemption which, under California law in effect on that date allowed him to exempt an amount not to exceed $45,000. The increase in value of the debtor's interest from $33,875 to $115,000 happened during the post-petition period. All post-petition costs related to the home were paid by the debtor from his post-petition earnings. No funds of the estate were expended on the home. The voluntary sale of the home by the debtor was in escrow and all but consummated at the time the trustee was appointed. The uncomplicated facts of the case lead to a simple question: should the debtor's exemption have had its effect on date of filing or on date of sale?

III. ANALYSIS

Time is particularly of essence in a bankruptcy case. It is typically the rapidly deteriorating financial state of a debtor that forces the unpleasant reality of bankruptcy. It is often the inability to manage both current debt and the current needs of a debtor's family, such as food, clothing and shelter, that precipitates the filing of a bankruptcy petition. The very

conditions that cause a debtor to seek a fresh start are by their nature ones that require immediate action.

It is for this and other reasons related to efficiency of administration that as bankruptcy law has come to us from England and evolved over the last two centuries, throughout the various iterations of Act and Code, the concept of a single date of cleavage has remained the *sine qua non* of bankruptcy administration. It has always been the case that on a date certain, a debtor files a petition and that date forever separates the debtor's pre-petition affairs from his post-petition affairs. (see e.g. *White v Stump*, 266 U.S. 310 (1924)) Petitioner contends that the opinion of the Ninth Circuit takes the administration of bankruptcy law into uncharted territory by establishing multiple dates on which the affairs of the debtor need be analyzed and adjudicated.

The "date of cleavage" has always been the defining moment in the rational administration of a bankruptcy case. On that date the debtor, aided by certain exempt assets, begins his or her fresh start. It is as though a snap shot is taken of the debtor's debts and assets at the moment of the filing of the petition. The exempt assets are extracted from that picture, given to the debtor as a post-petition asset free of the dischargeable debts of the bankruptcy, and what remains is a precise picture of the estate's assets which are available to satisfy the estate's debts.

Analyzing assets as if frozen in time is essential because it is the nature of property to change in value with time. The opinion of the Ninth Circuit changes the precision and elegance of relying on a single point in time to use as a point of analysis. If the opinion below stands, instead of a

having a single snapshot to analyze the debtor's affairs, the courts will be left to analyze a movie with property values, debtor"s rights and the estate's rights constantly in motion.

Arguably, this opinion, by itself, eviscerates the very concept of the "fresh start". Those oft used words, "fresh" and "start" contain a certain timeliness in their meanings. The dilemma posed by the decision of the Ninth Circuit was envisioned in *Weiman:*, 22 B.R. 49, 53 (9th Cir. BAP 1982):

> "There is an inherent contradiction in allowing discharged creditors, by virtue of invoking 544 to have access to the debtor's future earnings, as they become equity, or to the homestead itself should the debtor, years later, desire to leave it. The stay provisions of 362 and the character of discharge as an injunction, 524(a), in order to serve such a fresh start would be subverted. The debtor, instead of having a fresh start, would have a homestead subject to doubt and uncertainty..." *In re Weiman*, 22 B.R. 49, 53 (9th Cir. BAP 1982).

Yet, the cessation of an intolerable level of doubt and uncertainty is exactly what motivates debtors to seek bankruptcy protection. The opinion of the Ninth Circuit entitles a trustee to reach the future earnings of debtors as they add to the equity in the debtor's home at the point the value of the debtor's interest pierces the exemption value threshold. If so, a trustee would arguably be derelict in closing a case if it was reasonably possible that a debtor's equity in his or her home might increase in value. The dilemma is exacerbated by the reality that increases in a homeowner's equity are more than possible, they are quite probable. From the debtor's

view, even though he filed a petition, it would be perilous to pay down the principal on a mortgage or improve the homestead. A strong real estate market would be especially perilous. Any number of otherwise positive post-petition outcomes would cause the debtor to lose his or her home. This is but one of the illogical and inequitable outcomes likely to flow from the Ninth Circuit's opinion that exemptions can be realized only at the time of sale not the time of the filing of the petition.

This exact dilemma was discussed in *In re Herman*, 120 B.R. 127 (9th Cir. BAP 1990)

> "We need not decide whether the post-petition sale would be deemed an execution sale or a voluntary sale because *the post-petition sale is irrelevant in determining the exemption*." *In re Herman*, 120 B.R. 127, 130 (9th Cir. BAP 1990)(emphasis added)

> "Virtually all state exemptions protect judgment debtors from execution sales or other attempts to enforce judgments against certain property of the debtor. To require such a sale before a debtor could use state law exemptions in bankruptcy would eviscerate the purpose and function of exemptions and would cause absurd results. Moreover, such a result is inconsistent with the principle discussed above, that the existence of exemptions in a bankruptcy presupposes a hypothetical attempt by the trustee to levy upon and sell all of the debtor's property upon the filing of the petition." *In re Herman*, supra 120 B.R. 127, 132)(emphasis added)

This court has discussed the purpose of exemptions,

> "An exemption is an interest withdrawn from the estate for the benefit of the debtor". *Owen v. Owen*, 500 U.S. 305, 114 L Ed 2d 350, 357 (1991).

In Section 522 of the Bankruptcy Code on exemptions, it is stated:

> ""value" means fair market value as of the date of the filing of the petition..." 11 USC §522(a)(2)

Petitioner contends that the opinion of this court in *Owen,* in combination with the language Congress chose when writing the Code, leave little doubt as to the date on which the value of the debtor's interest in his home must be determined for the purposes of administering the homestead exemption. If the language of Congress is given meaning, the value of the interest that the debtor seeks to exempt must be $33,875. That amount is less than the $45,000 amount that he was allowed to exempt under California Law in effect at that time. The mathematics are quite simple and lead to only one conclusion: no interest related to the debtor's home remained in the estate during the post petition period.

The courts below construed the operative value for the purpose of determining exemption rights to be the $115,000 amount yielded from the sale a year and a half after the filing date. The Ninth Circuit based its opinion almost entirely on its interpretation of the holding in *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992) a California bankruptcy case with distinguishable facts. The opinion in the *Hyman* case discussed at length the calculus to be used in determining the value of the Hyman's interest in their home *on date of filing*.

Having determined that the value of the Hyman's home was $67,389 on date of filing, the Court held that while the value of the exempt interest ($45,000) was fixed in value on date of filing, the non-exempt interest ($22,389) was not fixed in value, could appreciate for the benefit of the estate, therefore its cash value to the estate could be determined at the time of sale and the Hymans' $45,000 interest would be realized as cash in the amount of $45,000 at the time of such a sale. No where in the *Hyman* decision was it suggested that in cases which lacked a non-exempt interest that the same procedures would be followed. Hyman is relevant to the instant case only to the extent that its distinguishable facts argue for a distinguishable outcome.

Petitioner contends that the Ninth Circuit erred in not noting the significance to the holding in *Hyman* of the existence of the estates non-exempt interest in the Hymans' home after the exempt interest was withdrawn.

Petitioner further contends that to render value of exempt property on date of filing irrelevant in the determination of rights of the debtor and the estate in other wise exempt property is inconsistent with the plain language of §522(a)(2). Exemptions are fundamental to the fresh start intent which begins with the filing of the petition. Therefore exemptions must synchronize with the filing date or there is may as well be no fresh start. Moreover, the concept of a single date of cleavage is fundamental to the administration of a case.

It is illogical to interpret the law as stating that on the one hand a debtor's post-petition assets cannot be reached by claims against the estate and to further state that his exempt

assets, based on conditions that exist on date of filing, are likewise beyond the reach of those same claims, but if the debtor uses his post-petition earnings to maintain or improve his homestead with the result that it increases in value post-petition, the homestead and the earnings expended on it can be seized for the benefit of the estate.

In other words, it was the opinion of the Ninth Circuit that the rights of the debtor and the estate, in property claimed as exempt, be determined by conditions that come into existence long after the filing of the bankruptcy petition, thereby placing the Ninth Circuit in conflict with principles that have heretofore been long been considered hornbook bankruptcy law.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The essential question presented in this case is the relationship between two significant code provisions: 11 USC §522(a) and 11 USC §522(b). The proper application of the Federal definitions of value relative to time under §522(a)(2), to the types and amounts allowed to be determined by the states pursuant to the opt out provision of §522(b) is an issue which has placed the Ninth Circuit in conflict with the other circuits and with the U.S. Supreme Court itself. This issue is of paramount importance because the essential clarity that use of a single date of cleavage has long brought to the administration of the Bankruptcy Code is eroded by the opinion of the Ninth Circuit, thereby affecting a large number of cases.

The USGPO's 1995 *Statistical Abstract* indicates that in 1994 alone 845,400 bankruptcies were filed in the US. In each of these cases, the issues of value and whether it is determined on date of filing or some other date is typically significant. The impact of the Ninth Circuit's decision to use some date other than the filing date to determine value of rights in the debtor's property has reached already beyond the Ninth Circuit and issues related to the application of the California homestead exemption.

The lower courts opinion has already been cited in the 7th circuit in the *Matter of Sherbahn* 170 B.R. 137 (N.D. Indiana 1994), to deny a debtor the post-petition fruits of growing crops from date of filing until harvest and sale thereby allowing discharged creditors the right reach the post petition earnings from a farmer's labor applied to growing a crop with the effect of denying the debtor a fresh start as of a date certain.

In 1995, 150,900 bankruptcy petitions were filed in California alone. A significantly large number of these filings involved individual debtor's who seek to protect their homes by claiming a homestead exemption. As the *Matter of Sherbahn* has indicated, the reach of the Ninth circuit's decision has extended beyond homestead exemptions to reach virtually any potentially exempt property which has a value capable of fluctuating over time. Therefore, even if the other circuits ultimately reject the reasoning of the Ninth Circuit in this matter and its impact were confined to California debtors, an extremely large class of citizens is directly affected by the lower court's opinion.

B. CONFLICT WITH THE SUPREME COURT OF THE UNITED STATES

In *White v Stump*, 266 U.S. 310 (1924), regarding the issue of time generally the United States Supreme Court held in pertinent part,

> "...that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. This has been recognized in our decisions. Thus we have said that the law discloses a purpose "to fix the line of cleavage" with special regard to the conditions existing when the petition is filed." *White v Stump*, 266 U.S. 310, 313 (1924)

Value is determined by property conditions and market conditions existing at a certain point in time. The Ninth Circuit's holding that exemptions are to be realized at the time of a voluntary sale based on property conditions and market conditions existing long after the date of filing is in direct conflict with this court's holding in *White v. Stump*.

White v. Stump explicitly addressed the timing of exemption rights,

> "When the law speaks of property which is exempt and of rights to exemption, it, of course, refers to some point of time. In our opinion, this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show -- some expressly and others impliedly -- that one common point of time is intended, and that it is the date of the

> filing of the petition." *White v Stump*, 266 U.S. 310, 313 (1924)

It would logically follow from the Supreme Court's plain language, that the trustee's right *or absence thereof* to sell otherwise exempt property under 11 USC §544 is fixed as of the date of filing based on the conditions (including conditions affecting value) existing on that date. The lower court's decision that a debtor's rights of exemption could only be realized at the time of sale based on the conditions affecting value at time of sale, long after the filing date, is in direct conflict with the Supreme Court in *White v. Stump*. Lastly, this court defined the right of exemption as:

> "--one which withdraws the property from levy and sale under judicial process."*White v Stump*, 266 U.S. 310, 313 (1924)

The opinion of the lower courts that there *must be a sale* for an exemption to be realized is in direct conflict with the opinion of this court that exemptions act to *prevent sale*.

The *White v Stump* opinion was reaffirmed in *Myers v Matley* 318 U.S. 622-628 (1943) where this court stated:

> "....the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may do...".*Myers v Matley* 318 U.S. 622-628(1943)

In the instant case the debtor was entitled to exempt his interest valued at $33,875 because a debtor can only exempt what was in the estate on date of filing

(See e.g. *Owen v. Owen*, U.S. 500 U.S. 305, 114 L Ed 2d 350,357(1991)). This value became fixed on date of filing. This value was thereafter enlarged to $115,000 at the time of sale by the actions of the debtor. The Ninth Circuit held that this enlarged value, based on the condition of the home and the market conditions existing long after the petition was filed, was the measure of the debtor's rights. The lower courts holding is in direct conflict with *Myers v Matley*.

Although *White v Stump* and *Myers v Matley* were decided under the preceding Act the paramount importance of using a single date of cleavage to determine the rights of a debtor in exempt property has carried forward to the present and *White v Stump* is often cited in the circuit courts and lower courts as on-point when the issues of time and exemption are determinative of the debtor's rights to exempt property pursuant to the Bankruptcy Code.

C. CONFLICTS AMONG THE CIRCUITS

The 3rd, 4th, 5th, 7th, 8th and 10th circuits have all held that exemption rights are determined as of the date of filing which place them in direct conflict with the Ninth Circuit's opinion in the present matter. Relevant excerpts from cases in these circuits follow.

It was the opinion of the Third Circuit that:

> "It has long been held, both in England and in this country, that the rights of the creditors of a bankrupt become fixed on the date of the filing of the bankruptcy petition" *In re Hansen Bakeries, Inc.* 103 F.2d 665, 666 (3rd Cir. 1939)

The Fourth Circuit found the:

> ".. state laws existing when the petition is filed the measure of the right to exemptions." *In re Palais v Dejarnette* 145 F.2d 953 (4th Cir. 1944).

The Fifth Circuit, citing the statutory language of 11 USC §522(b)(2)(A), held:

> "We find that the language of the Bankruptcy Code controls and that language indicates that where a case is converted from chapter 11 to chapter 7, exemptions are determined as of the chapter 11 filing date." *Matter of Williamson* 804 F.2d 1355, 1359 (5th Cir. 1986).

It is noteworthy that Williamson was a case of conversion from chapter 11 to chapter 7 as in the instant case. It found the date of filing to be paramount in the determination of the exemption rights of the debtor which places it in direct conflict with the decision of the Ninth circuit.

The Seventh Circuit, held that:

> "The rule established by the Seventh Circuit is consistent with other decisions of the U.S. Supreme Court which have dealt with the problem as to when the bankrupt's rights to exempt property are determined. One of the earliest decisions is found in White v. Stump, (1924) 266 U.S. 310". *Matter of Zahn*, 605 F.2d 323, 327 (7th Cir. 1979).
>
> "For the reasons stated, this court holds that the duty of a trustee in bankruptcy is to set off the exemptions which exist as to creditors generally on the day of filing bankruptcy." *Matter of Zahn*

605 F.2d 323, 329 (7th Cir. 1979).

It was the opinion of the Eighth Circuit that:

> "...we conclude that Peterson's right to a homestead exemption is determined by applying North Dakota law to the facts and circumstances of Peterson's case *as of the date he filed his petition.*" *In re Peterson* 897 F.2d 935, 938 (8th Cir. 1990)

The Eighth Circuit found support for that holding in *White v Stump*, (266 U.S. 310,303 (1924) and in *In re Friedman* which stated unequivocally,

> "It is hornbook bankruptcy law that a debtor's exemptions are determined as of the time of the filing of his petition." *In re Friedman*, 38 B.R. 275, 276 (Bankr. E.D.Pa. 1984).

Peterson is consistent with petitioner's contention that facts existing on date of filing are the only relevant facts to be considered in determining the rights of the debtor, the estate, creditors and the trustee in property claimed as exempt., and that state law exemptions, when used in a bankruptcy, must be applied to the facts as they exist on date of filing.

Citing *White v Stump*, the 10th Circuit held that:

> "It is true that exemption rights are determinable as of the date of the filing in bankruptcy". *Rutledge v Johansen*, 270 F.2d 881, 882 (10th Cir. 1959).

When viewed as a whole, the body of law at the U.S.

Supreme Court level and at the Circuit Court level is enormously broad and uniform with the opinion of the Ninth Circuit standing alone in direct conflict with this body of law. With this one decision, the Ninth Circuit has taken a point of law that has been well settled for literally centuries and unsettled it, thereby creating the sort of confusion noted above in *Matter of Sherbahn* 170 B.R. 137 (N.D. Indiana 1994). This confusion can only be expected to spread among the circuits unless the petition is granted.

D. CONFLICT WITHIN THE NINTH CIRCUIT

California alone had 150,900 bankruptcy petitions filed in 1995. This is a very large class of cases and the impact of using a single date of cleavage is significant in most of these cases.

Petitioner has already discussed the distinguishable facts in *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992). Yet, *Hyman* has caused the appearance of conflict which petitioner contends does not truly exist. On page XX of its opinion, the bankruptcy court expressed how troubling the apparently conflicting lines of authority were and the "enormous complexities" presented by these conflicts.

This appearance of conflict caused the decision in *In re Hall* 1 F.3rd (9th Cir. 1993), a well reasoned case directly on point on these issues, to be withdrawn. The opinion of the Ninth Circuit can only add to the enormous complexities of administering the many thousands of cases in California alone were this case will surely have broad effect. The sheer volume of cases involved argues strongly in favor of granting the petition.

E. CONFLICT WITH STATUTORY LANGUAGE

Petitioner contends that it is in the reading of the relevant statutes that the need for the granting of the writ becomes most apparent. Clear statutory language must be interpreted in a way that effectuates legislative intent.

11 USC §522

At issue here is: When a debtor seeks to exempt property from the estate, and the exemption in question is limited to property below a certain value, what value at what point in time is to be used? Congress spoke clearly in Section 522 on exemptions by defining value for the purpose of exemptions as follows:

> ""value" means fair market value as of the date of the filing of the petition...." 11 USC §522(a)(2).

The Ninth Circuit's opinion that value of property claimed as exempt is determined at time of sale is in direct and obvious conflict with the plain language of the relevant statute.

California is an "opt out" state pursuant to §522(b)(2)(A). The Ninth Circuit based its reasoning on its opinion regarding the proper use of California's Homestead exemption within a bankruptcy.

Yet the debtor contends that the plain language of §522(b)(2)(A) is in conflict with the Ninth Circuit's opinion. In pertinent part it states that a debtor may exempt from property of the estate

> "...any property that is exempt under Federal law, other than subsection (d) of this section, or

> State or local law *that is applicable on date of filing* of the petition..." 11 USC §522 (b)(2)(A)(emphasis added).

Black's Law Dictionary defines a law that is "applicable" as a law capable of being applied on date of filing; a law that has the right, ability or power of *doing something on date of filing*. So while §522(b)(2)(A) allows the states to define the types and values of property that can be exempted, Congress has made clear that the time frame for fixing value *cannot* be opted out of. The Ninth Circuit is therefore in direct conflict with the 522(b)(2)(A).

11 USC §541(a)(1)

The Bankruptcy Code states that the estate is comprised of, "...all legal or equitable interests of the debtor in property *as of the commencement of the case*." 11 USC §541(a)(1) (emphasis added).

The Bankruptcy court determined as a finding of fact that the fair market value of the aggregate of these interests was $33,875 at the commencement of the case. (The $225,125 interest of the bank did not become property of the estate) Therefore, the clear language of §541(a)(1) leads to only one conclusion: The estate took possession of the debtor's entire aggregate interest in his home on the date of filing which had a value of $33,875, no more and no less.

This point of law and fact is material to the issue of what was the nature of the property which was the object of the exemption. The issue of whether the California exemption can exempt "the residence itself" as discussed in the Ninth Circuit's decision is irrelevant. This point of law was made quite clear in this court's opinion in *Owen v Owen*,

> "Section 522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate cannot be exempted. Thus if a debtor holds only bare title to his house -- if, for example, the house is subject to a purchase-money mortgage for its full value -- then only that legal interest passes to the estate.....Legal title will pass, and can be the subject of an exemption" (*Owen v Owen*, 500 U.S.305,114 L Ed 2d 350,357(1991))

§541(a)(1) teaches us that the residence itself was not in the estate so the question of exempting the "residence itself" is irrelevant. The Ninth Circuit, in holding that a "residence itself" cannot be exempted is in direct conflict with this court's holding in Owen v Owen and is squarely in conflict with the relevant statutory language.

CALIFORNIA CODE OF CIVIL PROCEDURE §703.140 (as amended by S.B. No. 651, Oct.11, 1993)

Each of the courts below that have ruled on this matter have relied almost entirely on interpretations of the California exemption statutes contained in *In re Hyman* 967 F.2d 1316 (9th Cir. 1992). The *Hyman* decision was based on a strict reading of the statutory language as it existed in 1992.

The California legislature recognized that the original statutory language was flawed because it could be misconstrued as requiring a lien sale before exemptions could be used in bankruptcy. This was not a hypothetical concern because certain courts (See e.g. *In re Pladson* 35 F.3d 462 (9th Cir. 1994) had narrowly construed the California exemption in a way the clearly thwarted the legislative intent.

To further clarify the previous vague language which might be misconstrued as allowing the exemption to be realized only "if and when a trustee attempts to sell the property" (*In re Hyman*, 967 F.2d 1316 (9th Cir. 1992)), the new language stated that exemptions "are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure,....".(S.B.651) The Senate Bill went on further at Section 2 to state that this amendment, "..is not a change in, but is declaratory of existing law." (S.B. No. 651).

This bill was focused on the judicial error in *In re Pladson* 154 B.R. 305 (Bankr. N.D. Cal.1993), which case viewed the California homestead exemption as being available only when there is an execution sale. Yet, S.B.651 is equally relevant to the issues raised in this petition where the Ninth Circuit, in clear conflict with the language of CCP §703.140, required a sale to realize the California exemption.

F. SUMMARY

Each of the foregoing reasons is sufficient justification for granting the writ. As was stated in *Pladson*, it has long been:

> "...the well established principle articulated by the California appellate courts that California homestead exemption statutes should be broadly and liberally construed. *In re Pladson* 35 F.3rd 462, 465 (9th Cir. 1994)

The federal courts have likewise adopted the position that exemptions should be liberally interpreted where it serves the fresh start. (See e.g. *In re Ancira*, 5 B.R. 673 (B.Ct.

N.D.Calif.1981), *In re Andreotti*, 16 B.R. 29 (B.Ct. E.D.Calif.1981), *In re Cole*, 93 B.R. 709 (9th Cir. BAP 1988)).

The Ninth Circuit's decision is in conflict with the decisions of this court, the decisions in other circuits and clear statutory language. The most compelling reason for granting the petition for writ, however, is the damage this decision can do to the administration of bankruptcy and the fresh start intent of the Bankruptcy Code as rehabilitative legislation.

The instant case is an excellent example of the kinds of complications to bankruptcy administration presented by the Ninth Circuit's decision. The debtor's home was partially complete on date of filing. The post-petition increase in the debtor's equity came from a variety of factors, appreciation due to inflation, pay down of mortgage principal, investment of post-petition earnings in building materials used in the completion of the debtor's home and the sweat equity of the debtor's own labor at carpentry, landscaping etc.

Equitable principles dictate that even if by some theory the estate gets the appreciation, isn't the debtor equitably entitled to something for his post-petition expenditure of money and labor? Determining who gets how much of what equity on what date is a non-trivial matter. Imagine if the debtor was growing a crop on his land at the same time, or restored an old car etc. Add into this mix the fact that on date of filing the California homestead exemption limit was $45,000. By the time the home was sold, the California legislature had raised it to $75,000. The equitable issues are non-trivial and promise considerable court proceedings to sort out. These are the sorts of problems created when a simple

snapshot becomes a major motion picture.

CONCLUSION

The petition for Writ of Certiorari should be granted for the foregoing reasons. In the alternative, the petitioner requests the Court to grant summary reversal pursuant to Rule 23.1 of the Rules of the Supreme Court.

Respectfully submitted,

Joseph Moless, Jr. , Esq.
890 Washington Street
Santa Clara, CA 95050

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

TERRY ALSBERG, dba Alsberg Brothers Boatworks

Petitioner,

vs.

JEROME E. ROBERTSON

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER F I L E D NOV 28 1995

No. 94-15085
BAP No. Nc-92-2318-JAsO

in re: TERRY ALSBERG, dba
Alsberg Brothers Boatworks,

Debtor.

TERRY ALSBERG,
dba Alsberg Brothers,hers Boatworks,
Appellant ,

V.

JEROME E. ROBERTSON,
Chapter 7 Trustee,
Appellee.

Before: BEEZER and THOMPSON, Circuit Judges, and QUACKENBUSH, District Judge.*

The panel has voted unanimously to deny the petition for rehearing. Judge Beezer and Thompson vote to reject the suggestion for rehearing en banc and Judge Quackenbush so reccommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter an banc. Fed. R. App- P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable Justice L. Quackenbush, Senior United states District Judge for the Eastern District of Washington, sitting by designation.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TERRY ALSBERG, dba Alsberg Brothers Boatworks, Debtor.

No. 94-15085
BAP No NC-92-2318-JAsQ
OPINION

TERRY ALSBERG, dba Alsberg Brothers Boatworks, Appellant,

V.

JEROME E. ROBERTSON,
Chapter 7 Trustee, Appellee.

Appeal from the Bankruptcy Appellate Panel
of the Ninth Circuit
Jones, Ashland and Ollason, Bankruptcy Judges, Presiding

Argued and Submiitted
September 11, 1995-San Francisco, California

Filed October 11, 1995

Before: Robert R. Beezer and David R. Thompson, Circuit Judges, and Justin L. Quackenbush, District Judge.*

Opinion by Judge Beezer

*The Honorable Justin L. Quackenbush, Senior United States District
Judge for the Eastern District of Washington, sitting by designation.

SUMMARY

Bankruptcy/Exemptions/Real Estate

The court of appeals affirmed a decision of the Ninth Circuit Bankruptcy Appellate Panel (BAP). The court held that a bankruptcy debtor was entitled to the homestead exemption allowed under California law from the proceeds from the sale of his residence, but was not additionally entitled to the value of post-bankruptcy-petition appreciation in the value of the residence.

Appellant Terry Alsberg filed for Chapter 11 bankruptcy. At the time, he owned a residence worth $259,000 which was encumbered by a promissory note secured by a deed of trust for $225,125. At the time of filing, Alsberg was entitled, under an applicable California statute, to claim a homestead exemption of $45,000 on the residence.

Alsberg entered into an agreement to sell the residence for $380,000. The court converted the case to Chapter 7. Appellee Chapter 7 Trustee Jerome Robertson moved for approval of the sale. the motion was granted. The proceeds of the sale amounted to approximately $115,000, after payment of the mortgage, applicable costs of sale, and capital gains tax. Alsberg filed an amended schedule in which he, for the first time, claimed a homestead exemption of $45,000.

Alsberg moved to compel Robertson to abandon the proceeds of the sale, arguing that because the amount owed on the mortgage, plus the homestead exemption, exceeded the value of the residence at the time of filing, the residence had been effectively removed from the bankruptcy estate at the time of filing. Alsberg argued that the estate was not entitled to any of the proceeds of the sale; rather, he should receive them. The bankruptcy court determined that Alsberg was entitled to a homestead exemption of $45,000. The court also determined that because the estate had an interest in the residence when Alsberg filed for bankruptcy, and maintained that interest through the time of sale, the estate was entitled to

any appreciation in the value of the residence between the time of filing and the time of sale,

The BAP affirmed, holding that the estate was entitled to all post-bankruptcy-petition appreciation in the property, but Alsberg was entitled to $45,000 of the sale proceeds as a homestead exemption. Alsberg appealed.

[1] In In re Hyman, a case involving California debtors, the Ninth Circuit held that the debtors' claim for post-bankruptcy petition appreciation in their residence lacked merit. The Ninth Circuit held that the debtors' right to use the homestead exemption did not come into play upon the filing of the petition, but only if and when the trustee attempted to sell the property.

[2] in this case, when the original bankruptcy petition was filed, Alsberg's interest in the residence passed to the bankruptcy estate. His California homestead exemption could be realized only from the net proceeds of sale received by the estate. The estate held an interest in the residence at all times after filing of the petition. Thus, when the residence was sold, the proceeds vested in the estate. Alsberg was only entitled to $45,000 of the proceeds.

COUNSEL

Henry G. Rendler, San Jose, California, for the appellant.

Charles P. Maher, Rosenblum, Parish & Isaacs, San Francisco, California, for the appellee.

On February 4, 1988, Alsberg filed amended Schedules A and B. The amended schedules of February 4, 1988 do not include a schedule B-4, the schedule for claiming exemptions.

In August 1988, Alsberg entered into an agreement to sell the residence for $380,000 and moved for court approval of the sale. On September 28, 1988, the bankruptcy court

heard Alsberg's motion concurrently with a motion to convert the case to a Chapter 7 bankruptcy. The court converted the case to Chapter 7 and ordered the motion for approval of sale held in abeyance pending review by the trustee, Jerome Robertson ("Robertson"). Robertson determined that the sale should go forward, but that Alsberg's motion was defective. Accordingly, Robertson moved for approval of the sale. The motion was granted on October 28, 1988 and escrow closed on November 1, 1988. The proceeds of the sale amounted to approximately $115,000, after payment of the mortgage, applicable costs of sale and capital gains tax.

On January 24, 1989, Alsberg filed an Amended B-4 schedule, along with other amended and supplemental schedules. In the January 24, 1989, B-4 Schedule, for the first time, Alsberg claimed a homestead exemption of $45,000. Only the proceeds of the sale of the residence existed at this time.

In October 1991, Alsberg moved to compel Robertson to abandon the proceeds of the sale, arguing that because the amount owed on the mortgage ($225,125), plus the homestead exemption ($45,000), exceeded the value of the residence at the time of filing ($259,000), the residence was effectively removed from the bankruptcy estate at the time of filing. Accordingly, Alsberg concluded that the estate was not entitled to any of the proceeds of the sale, and instead, he should receive them. The bankruptcy court determined that (1) Alsberg was entitled to a homestead exemption of $45,000; (2) the property was worth $259,000 at the time of filing; (3) the tax liens were irrelevant to a determination of the amount allowable as a homestead exemption; and (4) because the estate had an interest in the residence when Alsberg filed bankruptcy, and maintained that interest through the time of sale, the estate was entitled to any appreciation in the value of the residence between the time of filing and the time of sale.

Both Alsberg and Robertson appealed to the BAP. The BAP affirmed, holding that the estate was entitled to all post bankruptcy-petition appreciation in the property, but that

Alsberg was entitled to $45,000 of the sale proceeds as his homestead exemption.

Alsberg timely appeals.

We review de novo decisions of the BAP. Steelcase Inc. v. Johnston (In re Johnston), 21 F.3d 323, 326 (9th Cir. 1994). We review, as does the BAP, the bankruptcy court's conclusions of law de novo and its findings of fact under the clearly erroneous standard. Id.

Under the Bankruptcy Code, 11 USC § 522(b)(2)(A), a debtor may claim a homestead exemption for his residence, and the amount of the exemption may be determined by state law. California Code of Civil Procedure SS 704.730(a)(2) sets the amount at $45,000 for debtor-homeowners in Alsberg's circumstances.

Alsberg argues that an aggregate $33,875 interest in the residence became the property of the bankruptcy estate on the date of filing the bankruptcy petition. 'Ibis sum represents $259,000 market value at the time the petition was filed, less a note for $225,125 secured by a deed of trust. He contends that the $45,000 homestead exemption was effective, apparently automatically, immediately after filing. Alsberg also contends that the homestead exemption operated to move the $33,875 interest out of the bankruptcy estate, leaving the estate with no interest in the residence after the date of filing the bankruptcy petition. Alsberg concludes that because the estate had no interest in the residence after the date of filing the bankruptcy petition, the estate is not entitled to post bankruptcy-petition appreciation.

This case is controlled by the rule enunciated in *Hyman v. Plotkin* (In re Hyman), 967 F.2d 1316 (9th Cir. 1992).(2) Alsberg relies heavily on *Rigby v. Hall* (In re Hall), I F.3d 853 (9th Cir. 1993). That opinion, however, has been withdrawn and vacated, and is no longer controlling precedent. *In re Hall*, 1 F.3d 853 (9th Cir. 1993), withdrawn and vacated, 41 F.3d 502 (9th Cir. 1994), superseded by 42

F.3d 1399 (9th Cir. 1994).

[1] In *In re Hyman*, the Hymans, residents of California, owned a residence valued at $415,000 at the time of filing the bankruptcy petition. The residence was encumbered by approximately $348,000 in liens, resulting in a net equity of approximately $67,000. The Hymans claimed a $45,000 homestead exemption. The bankruptcy court approved the trustee's motion for permission to sell the Hymans' residence. The Hymans sought declaratory relief, claiming, among other things, that they were entitled to all post-bankruptcy-petition appreciation in their residence. We held:

> [The Hymans' claim for appreciation is without merit. The California statute gives the Hymans a $45,000 exemption as of the time of sale, not a $45,000 equity in the property.... Only in the bankruptcy context, where an appreciable period of time usually passes between filing of the petition and sale of the property, can the property rise or fall in value. . . . 'Me debtor's right to use the exemption comes into play not upon the filing of the petition, but only if and when the trustee attempts to sell the property. *In re Hyman*, 967 F. 2d at 123 1.

[2] When the original bankruptcy petition was filed, Alsberg's interest in the residence passed to the bankruptcy estate. Alsberg's California homestead exemption can be realized only from the net proceeds of sale received by the estate. The estate held an interest in the residence at all times after the petition was filed. Therefore, when the residence was sold, the proceeds of the sale vested in the estate. When Alsberg subsequently filed a claim for a $45,000 homestead exemption after the sale of the property, he became entitled to $45,000 of the proceeds, and no more.

(2) We recently stated in *Bernard v. Coyne* (In re Bernard), 40 F.3d 1028, 1030 n.2 (9th Cir. 1994) that the argument that a homestead exemption operates to remove the residence itself

from the bankruptcy estate "is now deemed foreclosed in this circuit.' All the cases in which we have considered this argument have relied upon provisions of the California statutory homestead exemption. We have yet to consider this argument as applied to the homestead exemption statutes of other states in this circuit.

AFFIRMED

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

0 P I N I 0 N
(cross-appeal)

In re
TERRY ALSBERG, dba ALSBERG
BROTHERS BOATWORKS, Debtor.
NC-93-1399-JAsO
BAP Nos. NC-92-2318-JAsO
Bk. No. 587-2962

JEROME E. ROBERTSON, Trustee,
Appellant/Cross-Appellee,

V.

TERRY ALSBERG, dba ALSBERG
BROTHERS BOATWORKS,
Appellee/Cross-Appellant.

Argued and Submitted on September 23, 1993
at San Francisco, California

Filed - DEC 1 6 1993

Appeal from the united States Bankruptcy Court
for the Northern District of California

Honorable Arthur S. Weissbrodt, Bankruptcy Judge,
Presiding

Before: JONES, ASHLAND and OLLASON, Bankruptcy
Judges.

JONES, Bankruptcy Judge:

FACTS

The debtor, Terry Alsberg, filed a petition under Chapter 11 of the Bankruptcy Code on May 29, 1987.1 At that time, Alsberg owned and resided in a home at 1225 Prospect Street in Santa Cruz, California (the "Property") which is the subject of the instant appeal.

In his schedules and statements, Alsberg stated that the Property was worth $285,000. When Alsberg filed bankruptcy, the Property was encumbered by a deed of trust in favor of Coast Savings and Loan Association in the amount of $225,125, and by Internal Revenue Service ("IRS) and county tax liens which totaled about $86,000.

Alsberg was apparently unsuccessful attempting to reorganize-- and entered into an agreement to sell the Property on August 31, 1989. He then filed a motion for approval of the sale which was heard concurrently with a motion to convert the case to Chapter 7 on September 28, 1988. After that hearing, the court converted the case to a Chapter 7 and ordered the motion for approval of the sale held in abeyance pending review by the trustee, Jerome Robertson ("Trustee").

The Trustee determined that the sale should go forward, but that the motion for approval of the sale prepared and noticed by Alsberg's counsel was defective in a myriad of ways. The Trustee filed and served another motion for approval of the sale. The court finally approved the sale of the property with part of the proceeds used to pay off the deed of trust, costs of sale and capital gains tax. The rights to the remaining proceeds, about $115,000, were to be determined later.

In October, 1991, Alsberg filed a motion to compel the Trustee to abandon the remaining proceeds. Alsberg had obtained an appraisal in May, 1991, which stated that the value of the Property, as of May 29, 1987 when he filed bankruptcy, was $259,000. Alsberg argued that because the Coast Savings lien, combined with his California homestead exemption of $45,000, exceeded the value of the Property on

the date he filed bankruptcy, the estate never had any interest in the Property. As a result, Alsberg asserted that he was entitled to any appreciation in the value of the Property during the pendency of the case.

The Trustee opposed Alsberg's motion for abandonment on three grounds. First, the Trustee asserted that Alsberg's homestead exemption did not protect him from the county or IRS liens and that the Trustee thus was obligated to distribute the sale proceeds in accordance with Bankruptcy Code § 724(b). According to the Trustee, this fact, combined with the order approving the sale of the Property which required the Trustee to distribute the proceeds of the sale, gave the estate an interest in the Property regardless of the existence of Alsberg's homestead exemption.

Second, the Trustee questioned Alsberg's assertion that the Property was worth $259,000 when Alsberg filed his Chapter 11 petition. The Trustee noted: (1) that this allegation was based upon a May, 1991 appraisal which attempted to recreate the value of the Property as of May 29, 1967; (2) that Alsberg had written a letter to the Trustee's counsel in January, 1990 which indicated that value of the Property then was either $296,875 or $301,942; and (3) that a September 1, 1988 appraisal indicated that the Property was worth $380,000. The Trustee asserted that the Property was worth substantially more than $259,000 when Alsberg filed bankruptcy and that the estate therefore had an interest in the Property and was entitled to any appreciation.

Third, the Trustee asserted that, regardless of the value of the property at the time Alsberg filed bankruptcy, Alsberg could not receive more than $45,000, the amount allowed under California law for a homestead exemption. Thus, of the proceeds remaining, Alsberg could receive no more than that.

After a hearing and submission of several supplemental briefs, the trial court issued a written decision determining: (1) that Alsberg was entitled to a homestead exemption of $45,000, because the amount allowable as a homestead is

determined when property is sold; (2) that the Property was worth $259,000 when Alsberg filed bankruptcy; (3) that tax liens are irrelevant for purposes of deterimining the amount allowable as a homestead exemption; and (4) that because the estate had an interest in the Property when Alsberg filed bankruptcy, which it had not abandoned at the time of sale, the estate was entitled to any appreciation in the value of the Property during the case.(2)

Both Alsberg and the Trustee appeal. We affirm.

ISSUE

Whether the trial court correctly held that the appreciation in the value of the Property during the pendency of the bankruptcy case belonged to the estate, not to Alsberg.(3)

STANDARDS OF REVIEW

The court's holding that the estate is entitled to postpetition appreciation of the Property is a question of law which we review de novo. See *In re Wade*, 115 B.R. 222, 225 (9th Cir. BAP 1990).

DISCUSSION

1. Introduction

Whatever the value of the Property when Alsberg filed bankruptcy, it increased substantially post-petition. Alsberg contends that because the Coast Savings lien, plus his $45,000 homestead exemption, exceeded the value of the Property

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(2) The court specifically stated that it was not determining Alsberg's rights vis-a-vis those of the county or the IRS. Those claims were to be determined in a separate proceeding.

(3) The Trustee also challenges the trial court's finding that the value of the Property when Alsberg filed bankruptcy was $259,000. As will be seen below, however, the value of the Property on that date would not change the result we reach, so we do not discuss that issue.

when he filed bankruptcy, the estate never had an interest in the property and he is therefore entitiled to the full amount of the appreciation. Alsberg alternatively argues that abandonment was justified because the Property was over encumbered by the Coast Savings lien, plus his homestead exemption.

The Trustee argues that the tax liens must be added to the value of the Coast Savings lien before determining whether there was equity in the Property which would allow Alsberg to claim a homestead exemption. When this is done, according to the Trustee, there was no equity in the Property when Alsberg filed bankruptcy, so Alsberg can claim no homestead exemption. Alternatively, the Trustee argues that the amount of Alsberg's homestead exemption was capped at $33,875 because that was the amount of equity in the Property over and above the Coast Savings lien when Alsberg filed bankruptcy.

The parties' arguments diverge on tangents because of fundamental misunderstandings about two things: (1) The scope of the trial court's decision with respect to the tax liens, and (2) the concept of property of the bankruptcy estate. By clarifying these two issues we clear up confusion and simplify this appeal considerably.

2. Scope of the Trial Court Decision

The Trustee argues that the tax liens effectively eliminate Alsberg's homestead rights because they must be added to the Coast Savings lien before determining whether there is any equity in the Property to which Alsberg's homestead exemption can attach. He also asserts that the existence of the tax liens gives the estate an interest in the Property that it might not otherwise have pursuant to Bankruptcy Code § 724(b).(4)

(4 section 724(b) governs distribution of tax lien claims. It effectively charges administrative claims against tax liens to the extent that the tax liens are secured by property of the estate.

These arguments, however, are irrelevant to this appeal because the trial court specifically stated that its decision was limited to a determination of Alsberg's and the bankruptcy estate's rights to the sale proceeds. Whether the taxing authorities had any claim to the funds superior to either Alsberg or the Trustee was to be decided in a separate proceeding. Thus, whether § 724(b) gives the estate an interest in the Property is not relevant here. Moreover, as discussed below, the Trustee need not rely on § 724(b) to create an interest in the Property on behalf of the estate.

3. Property of the Estate and Related Issues

Bankruptcy Code § 541(a)(1) states that property of the estate includes "all legal or equitable interests of the debtor as of the commencement of the case.11 11 U.S.C. § 541(a)(1). In the case at bar, Alsberg owned the Property when he filed bankruptcy. Clearly, therefore, the Property became property of his bankruptcy estate.

Once it becomes property of the bankruptcy estate, property can exit, for purposes of this appeal, by one of two methods: exemption or abandonment. Pursuant to Bankruptcy Code § 522, a debtor may claim as exempt certain property of the bankruptcy estate which he or she takes free and clear of any interest of the estate or the claims of creditors. See 11 U.S.C. SS 522(b); *Owen v. Owen*, 500 U.S. 305, 111 S. Ct. 1833, 1835 (1991). In *Owen*, the Supreme Court noted that "[n]o property can be exempted . . . unless it first falls *within* the bankruptcy estate."111 S. Ct. at 1835. Thus, property that is later claimed as exempt must come into the bankruptcy estate in the first instance.

Alsberg asserts that the Property never became property of the estate because the Coast Savings lien, combined with his homestead exemption, exceeded the value of the Property. This argument is baseless. The Property did become property of Alsberg's estate. His claim of an exemption only allows him to take back out of the estate the property representing his exemption. There is no authority for

the position that the Property never became property of the estate; indeed, that argument is directly contrary to both statutory and case law.

Pursuant to Bank:ruptcy Code §554, property of the estate that is burdensome or of inconsequential value to the estate may be abandoned. 11 U.S.C. §554. Either the trustee or a party in interest may seek abandonment of property, but abandonment is not effective until both the procedural and the substantive requirements of §554 are satisfied. See 11 U.S.C. § 554(a), (b); *Sierra Switchboard Co. Westinghouse Electric Corr.*, 789 F.2d 705, 709-710 (9th Cir. 1986).

The retnaining issue is not abandonment; there is no basisfor ordering abandonment of the property at issue because the property is now cash in a bank account. Thus, it clearly is neither burdensome nor inconsequential. Rather, the issue is how much, if any, of the remaining funds should be paid to the Alsberg and how much should be retained by the Trustee pending a determination of the tax claims. This determination has nothing to do with abandonment.

4. Entitlement to Appreciation

Once again, we must emphasize what we are and are not deciding in this appeal. We are not deciding whether Alsberg's homestead exemption takes priority over either of the tax lien claims. That issue will be determined separately. Rather, we decide only how nuch of the remaining proceeds Alsberg is entitled to receive versus how much the estate is entitled to receive. There are three possibilities:

1. Alsberg gets $33,875, the difference between the value of the Coast Savings lien and the value of the Property as of the date Alsberg filed bankruptcy;

2. Alsberg gets $45,000, the full statutory amount of his homestead exemption; or

3. Alsberg gets the full $121,000 because, when he filed

bankruptcy, the Coast Savings lien plus his homestead exerption exceeded the value of the Property.

Not surprisingly, the Trustee argues for option number 1and Alsberg argues for option number 3. The trial court adopted option number 2 and we affirm.

We agree with the trial court's analysis of the Ninth Circuit's decisions in *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992) and In re Reed, 940 F.2d 1317 (9th Cir. 1991), which hold that the bankruptcy estate, and not the debtor, is entitled to post-petition appreciation in estate assets(5) and that the amount of the debtor's homestead exemption is determined when the subject property is sold rather than being fixed as of the date the debtor files bankruptcy. See *Hyman*, 967 F.2d at 1321; *Reed*, 940 F.2d at 1323.(6)

This analysis makes sense especially in a case such as the one here. Alsberg filed a Chapter 11 petition and apparently tried for over a year to reorganize at which time he decided to sell the Property. He signed a sale agreement and filed a wholly inadequate motion for approval of the sale. At about the same time, the court, at the request of creditors,

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(5) We recognize that one recent Ninth Circuit case, *In re Hall*, 1 F.3d 853, 855 (9th Cir. 1993), suggests that the debtor is entitled to post petition appreciation in the value of a residence. We find *Hall* distinguishable because the debtors there were not in the process of selling the residence at the time of the conversion (effectively requiring the trustee to consummate the sale) and there were no tax liens on the property as in the instant case. Moreover, Hall does not discuss, and clearly does not overrule, *Hyman* and *Reed*.

(6) Alsberg argues that *Hyman* and *Reed* are distinguishable because they involved cases where the value of the subject property exceeded the value of liens and the debtors' homesteads. Although Alsberg is factually correct, nothing in either case suggests that this fact was material to the court's decision and we find this distinction irrelevant.

converted the case to a Chapter 7 and the Trustee was appointed. After reviewing the sale agreement, the Trustee determined that thesale was a good deal but that a new motion for its approval would need to be prepared and noticed. The Trustee also was aware that there were tax liens on the Property that might bring Bankruptcy Code §724 into play. The Trustee then sought approval of the sale and consummated it, and marshaled other assets of the estate. only then did Alsberg assert that the estate had no interest in the Property. Under these facts, we cannot agree with Alsberg.

CONCLUSION

We conclude that the trial court properly held that the estate was entitled to post-petition appreciation in the Property, but that Alsberg was entitled to $45,000 of the sale proceeds as his honestead exemption. AFFIRMED.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

Terry Alsberg, dba
Alsberg Brothers Boatworks,
Debtor

Case No. 587-02@62 ASW
Chapter 7

OPINION

1. Introduction

This matter came before the Court on the motion to compel abandonment by Debtor Terry Alsberg, dba Alsberg Brothers Boatworks ("Debtor"). Debtor seeks to compel Jerome E. Robertson, the Chapter 7 Trustee ("Trustee") of Debtor's estate to abandon the remaining proceeds of sale of the Debtor's former residence pursuant to 11 U.S.C. SS 554(b). The motion was opposed by the Trustee, the Internal Revenue Service ("IRS) the County of Santa Cruz, and wage claimants of the Debtor.

1 At the hearing on this matter, the Debtor requested that the Court determine the rights to these proceeds of the Debtor and the Trustee, and reserve the question of the rights of the IRS, the County of Santa Cruz and the wage claimants for another day. The Debtor indicated in this regard that some of these claims may be subject to objection and that he hoped to negotiate with the remaining claimants if he succeeded with respect to the instant notion. All parties agreed to the Debtor's proposal on the condition (1) that the Court's ruling would bind the Debtor and the Trustee but would be without prejudice to the rights of the other parties listed above, and (2) that any funds determined by the Court to belong to the Debtor would remain in escrow pending further order of the Court. The Debtor agreed to these two conditions. Thus, this decision deals solely with the rights of the Debtor and the Trustee.

Henry G. Rendler, Esq. appeared on behalf of the Debtor. J. Jeffrey Almquist, Esq. appeared on behalf of the wage claimants. Douglas Chang, Esq. appeared on behalf of the IRS. Kathleen Akao, Esq. appeared on behalf of the County of Santa Cruz Tax Collector. Charles P. Maher, Esq. of Rosenblum, Parish & Isaacs, P.C. (formerly Rosenblum, Parish & Bacigalupi, P.C.), appeared on behalf of the Trustee.

Following oral argument, the parties filed briefs on several issues. The final set of briefs was received by the Court on July 15, 1992.

This motion presents some very difficult issues which require the Court to reconcile seemingly contradictory lines of authority regarding the valuation date of the estate's interest in property, and the estate's entitlement to post-petition appreciation of that property. Although this issue is complex enough, the matter is further complicated by the Debtor's claim to a homestead exemption on property subject to unavoidable federal tax liens on the petition date. Finally, many of the case law decisions pertinent to resolution of the issues presented by this motion were issued by Ninth Circuit courts and the United States Supreme Court while Debtor's motion was pending before the Court.

The Court's decision must resolve the follow.following issues. First, is the. Debtor entitled to his homestead exemption? Second, what is the estate's interest in post-petition appreciation when there is no equity for the estate on the petition date?

Based on the Court's analysis of the issues, and having considered the evidence and arguments submitted by the parties, the Court grants the Debtor's motion in part, and orders the Trustee to abandon to the Debtor $45,000 of the sale proceeds.(2)

II. Factual Background

Debtor filed a voluntary Chapter 11 petition on May 29, 1987. At the time of filing, Debtor resided in a house located in Santa Cruz, California ("the house"). In support of the instant motion to abandon, Debtor submitted an appraisal dated: May 20, 1991 ("the appraisal"), which stated

2 These funds are to be escrowed; see footnote 1.

that the house had a fair market value of $259,000 at the time the petition was filed. The appraisal is factually supported. The Trustee contends that the house was worth at least $285,000 on the petition date. The Trustee relies on the Debtor's schedules in which he listed a value for the house or $285,000.

The Trustee has submitted no independent evidence on the value of the house. The Court accepts the appraiser's conclusion and finds that the house had a fair market value of $259,000 on the- petition date.

At the time Debtor filed his bankruptcy case, the house was encumbered by a deed of trust in favor of Coast Savings and Loan Association to secure a debt of approximately $225,125. The County of Santa Cruz and the IRS each had recorded liens for delinquent taxes against the house. The liens in favor of the County of Santa Cruz totaled $6,289.36. The liens in favor of the IRS totaled $80,383.43, making the total amount of liens for delinquent taxes as of the petition date, $86,672.79.

The Debtor does not include the tax liens when he calculates the equity in the property. Thus the equity in the property at the time of filing according to the Debtor was:

$ 259,000	Fair Market Value
- 225,125	First Deed of Trust
$ 33,875	Equity

In his petition, the Debtor claimed a homestead exemption of $45,000 to which no objections were filed. Debtor asserts, based on this calculation and his homestead exemption, that there was no equity for the estate on the petition date.

The Trustee includes the tax liens in calculating the equity available for Debtor's homestead exemption. Using either the $285,000 scheduled value, or the $259,000 value per the Debtor's appraisal, the Trustee asserts that the Debtor had no equity for his homestead exemption when the petition was filed.

After his case had been pending for one year, the Debtor (acting as debtor-in-possession), entered into a contract

with Ronald Morse ("Morse") on August 31, 1988, whereby Morse agreed to buy the house for $380,000. Debtor filed an application for court approval of the sale. The unsecured wage claimant creditors filed a motion to convert the case to Chapter 7. Both motions were set for hearing on September 28, 1988. The motion to convert was granted, and Jerome E. Robertson was appointed Trustee. The hearing on the application for approval of the sale was continued to allow the Trustee to review the proposed sale.

The Trustee concurred that the sale was appropriate, and noticed a hearing on the Trustee's application to sell the property free and clear of liens. On October 28, 1988, the Court entered an order permitting the sale of the house free and clear of certain liens and Debtor's homestead exemption, with those liens and the claimed exemption to attach to the proceeds of the sale. The sale occurred and escrow closed on Nov. 1, 1988.

The actual net results of the sale of the house were:

$ 380,000	Sale Price
- 225,125	First Deed of Trust
- 15,000	Capital Gains Tax
- 24,193	Other Selling Costs
$115,68	Net Sale Proceeds

With respect to the other assets of the estate, the Trustee has recovered $14,500 in preferential transfers, and realized $4,000 from the sale of a trailer. The Trustee represents that the estate now contains $129,000. The IRS tax liens have increased to $105,000, and the County's liens to $11,400.(3)

In response to the Debtor's notion, the Trustee proposes the following distribution of the assets of the estate, in the order stated:

1. $43,000 for the Trustee's commission, attorneys' fees, and accountants' fees;

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(3) The Trustee does not explain these numbers. The Court assumes that they include accrued interest.

2. $23,000 for wage claimants;

3. $63,000 to the taxing authorities pro rata.

Under the Trustee's proposed distribution, nothing will be paid to the Debtor on account of his homestead exemption because there was *no equity available for the exemption* on the petition date. Debtor proposes that the entire net sale proceeds be distributed to him as the appreciation of his house, which he asserts belongs to him because the *estate had no interest* in the house on the petition date.

III. Issues

A. Is Debtor entitled to his homestead exemption?

B. What is the estate's interest in post-petition appreciation when there is no equity for the estate on the petition date?

IV. Analysis

A. The Availability of Debtor's Homestead Exemption

Under California law, once a debtor's homestead exemption is allowed, a property right to the exemption amount from the sale of the residence revests in the debtor, and is no longer part of the bankruptcy estate. *In re Reed*, 940 F.2d 1317 (9th Cir. 1991) ("Reed"). Debtor's homestead exemption in this case is allowed because the validity of the claimed exemption was not contested within the thirty day period of Bankruptcy Rule 4003(b). See *Taylor v. Freeland & Kronz*, _ U.S. _, 112 S. Ct. 1644 (1992).

In *Reed*, a Chapter 7 debtor held a one-half joint tenancy interest in a house he owned with his wife. The debtor's interest was worth $300,000, and a secured debt of $380,000 encumbered the residence. The debtor claimed a homestead exemption of $45,000. After the debtor and his wife sold the property, the trustee filed an action for an accounting of the proceeds against the debtor and sought to have the funds

turned over for the benefit of the estate. The court held that a right to $45,000 of the proceeds of sale revested in the debtor, but that the residence and all remaining net proceeds were still part of the bankruptcy estate. *Id.* at 1321.

Under the holding of *Reed*, a debtor has a right to his allowed homestead exemption, which right left the bankruptcy estate when no objections to the exemption were timely filed; the exemption amount is payable out of the proceeds of sale. However, the remaining net sale proceeds are still part of the bankruptcy estate. *Id.*; Bankruptcy Rule 4003(b).

The decision in *In re Hyman*, 123 B.R. 342 (Bankr. 9th Cir. 1991), aff'd, 967 F.2d 1316 (9th Cir- 1992) (*"Hyman"*), supports the conclusion that the calculation of the amount payable on account of a debtor's homestead exemption should be done on the date of sale. *Hyman* held that a debtor's homestead exemption is a fixed dollar amount payable from the proceeds of the sale of the house. *Hyman*, 967 F.2d at 1321. The California homestead exemption statute also defines a homestead exemption to be part of the "proceeds of sale". Cal. Civ. Proc. Code §704.720(b).

The Trustee argues that the tax liens recorded against Debtor's house must be included when calculating the equity available for Debtors homestead exemption. If the tax liens were included at the petition date, there would be no equity available for the Debtor's exemption. If the tax liens were included at the time of sale, there would also be no equity for the exemption. (4) The Trustee has not cited, nor did the Court t find, any case holding that tax liens must be included when calculating equity for a homestead exemption.

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(4) There are a number of cases which discuss the determination of equity for a homestead exemption for the purpose of avoiding judicial liens under Section 522(f). See, e. a. , In Re Reed, 940 F. 2d 1317 (9th Cir. 1991) ; In Re Anderson, 824 F.2d 754 (9th Cir. 1987) ; In Re Herman, 120 B.R. 127 (Bankr. 9th Cir. 1990), In Re Cole, 93 B.R. 707 (Bankr. 9th Cir. 1988); In Re Kruger, 77 B.R. 785 (C.D. Cal. 1987). These cases are unanimous in holding that non-consensual liens should not be included.

In any event, the Trustee's approach is inapposite- The Trustee cannot assert the rights of the taxing authorities of the federal government in order to defeat the Debtor's homestead exemption. The Court is not deciding a dispute over rights to *appreciation as between the federal government and the Debtor*. Rather, on this motion, the Court is deciding, as between the estate and the Debtor, whether the Debtor's homestead exemption is available.

The Court is aware of the paramount right of the federal government to collect taxes, notwithstanding any state-law exemptions that may be asserted. See, e.g., *United States v. Heffron*, 156 F.2d 657 (9th Cir. 1947) (holding that a state homestead exemption is ineffective against a federal tax lien). The Courts order allowing the Debtor his homestead exemption will not prejudice the rights of the federal government. The IRS continues to have every remedy for payment of unpaid taxes after resolution of the present motion that it had before the motion. The Court's decision only requires the Trustee to abandon the estate's claim to the Debtor's homestead exemption amount. The IRS has no opposition to this approach as set forth in footnote 1, supra.

In *In re Galvan*, 110 B.R. 446 (Bankr. 9th Cir. r. 1990) ("Galvan"), the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP) discussed the determination of the available homestead exemption in a Chapter 13 case where a judicial lien had been recorded against the property. The court held that the equity available for a debtor's homestead exemption is calculated by excluding the non-consensual lien. The "available exemption" is equal to the lesser of: (1) the equity of the debtor in the property, or (2) the maximum value of the claimed exemption. *Id.* at 450.

Hyman requires that this court determine the amount of a debtor's homestead exemption as of the date of sale. In this case, following the teachings of *Hyman* and *Galvin*, there-was equity in the house on the date of sale of $115,682. The maximum value of the claimed exemption is $45,000. Under *Galvan*, Debtor's available homestead exemption is the lesser of these two amounts, or $45,000. See also *Hyman*, 967 F.2d at 1319.

B. The Estate's Interest

The Court perceives a conflict among the applicable authorities, discussed below, over the valuation Of the estate's interest. one line of cases requires the Court to hold that the estate's interest is valued at the petition date. Under these cases, the estate would have no interest in Debtor's house, and therefore, the estate should have no interest in the postpetition appreciation on it. The second line of cases requires the court to hold that the estate is entitled to post-petition appreciation. In a case such as this one, where property has no equity on the petition date and enters the estate under section 541, and then appreciates during the bankruptcy without having been formally abandoned to the Debtor, the application of these two lines of authority presents enormous complexities.

1. Date of Valuation

In *In re Kaplan*, 97 B.R. 572, 578 (Bankr. 9th Cir. 1989) ("Kaplan"), the BAP held that, in cases filed under Chapter 11 which are subsequently converted to Chapter 7, property is valued as of the date the petition is filed, not the date the case is converted.

In Kaplan, the debtor had claimed that his profit sharing plan was exempt. The creditors argued that the filing date of the petition should control for purposes of valuing exemptions because, in that case, the assets of the plan would become part of the estate and thus be available for distribution to creditors. The BAP agreed with the creditors and, quoting *In re Magallanes*, 96 B.R. 253 (Bankr. 9th Cir- 1988), held:

> Where a case is converted from Chapter 11 to Chapter 7, property of the estate is determined by the filing date of the Chapter 11 petition, and not by the conversion date. *Kaplan*, 97 B.R. at 575. (5)

Application of the straightforward rule in *Kaplan* to the facts of the instant case results in a holding in favor of Debtor's position on this issue. The estate's interest must be valued as of the petition date. However, as noted above, it

would be illogical for the estate to have no interest in the house and still be entitled to the post-petition appreciation on it.

As of the petition date in this case, May 29, 1987, the house had a fair market value of $259,000. It was subject to a consensual lien of $225,000, tax liens of $86,672.79 and Debtor's homestead exemption of $45,000.(6) The estate therefore had no equity interest in the house as of May 29, 1987. Accordingly, if the estate's equity interest as of the petition date were determinative of the issues before the Court, the Debtor, not the estate, would be entitled to all of the postpetition appreciation.

2. Interest in Post-Petition Appreciation

The Court concludes, however, that the estate had a local interest in the house. The house became property of the estate under 11 U.S.C. § 541(a) when the petition was filed. The estate never abandoned this legal interest. As a result, the estate, not the Debtor, is entitled to the post-petition appreciation of the house over and above the Debtor's homestead exemption.

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(5) The Trustee cites to *In re Winchester*, 46 B.R. 492 (Bankr. 9th Cir. 1984), for the proposition that the estate's interest should be determined at the date of conversion. However, it involved a case which was converted from *Chapter 1*3 to Chapter 7, and was decided under the exemption laws of the State of Oregon. The case at bar was converted from Chapter 11 to Chapter 7, and is decided under the exemption laws of the State of California. The holding in Kaplan, not e applies to this case.

(6) The substantive law of California regarding the amount of exemptions controls in this case. The Bankruptcy Code allows the states to define what property a debtor may exempt from the estate. __U.S. _, Ill S. Ct. 1833, 114 L. Ed.2d 350 (1991). California is one of the states that has "opted out" of the federal exemptions. Cal. Civ. Proc. Code SS 703.130.

The Ninth Circuit Court of Appeals has held that 11 U.S.C. §541(a)(6), which states that the bankruptcy estate is comprised of "proceeds, product, offspring, rents, or profits of or f From property of the estate", means that post-petition appreciation enures to the estate, not to the Debtor. *Reed*, 940 F.2d at 1323. The non-exempt post-petition appreciation of the house in this case will benefit the estate.

However, citing *Hyman*, the Trustee argues that the Debtor is not entitled to a homestead exemption and that the estate presently has an interest in all the net sale proceeds of the house regardless of whether there was equity in the house for the estate at the time of filing.(7) The Court rejects this argument for the reasons discussed below.

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(7) The Trustee argues that the Debtor is not entitled to a homestead exemption at all under Spencer v. Lowery, 235 Cal. App. 3d 1636, 1 Cal. Rptr. 2d 795 (1991), a decision which is not binding on this Court. Although the Spencer court criticized the Ninth Circuit's interpretation of California exemption law in In Re Cole, 93 B.R. 707 (Bankr. 9th Cir. 1988) ("Cole") in the context of a Chapter 11 debtor, the house in the case at bar was sold after the case had been converted to Chapter 7. The Debtor here is entitled to the statutory exemption under Cal. Civ. Proc. Code SS 704.720(b) because a sale by a Chapter 7 trustee is analogous to a forced sale. Cole, 93 B.R. at 709.

The Spencer court's view was that sales by Chapter 11 trustees are not within the exemption. This Court does not believe that that is a correct statement of California law. The Chapter 11 trustee, not the debtor, is "in possession" of, and, as a legal and practical matter, controls the disposition of the property of the estate.

If California law actually provided that when debtors, residences are sold by Chapter 11 trustees by order of the bankruptcy court, that the debtors have no right to a homestead exemption, then many of the advantages of filing bankruptcy (e.g., avoidance of judicial or unperfected liens) would be lost, and the "fresh start" policy would be frustrated. This Court must follow

The Trustee relies on *Hyman*. In affirming the BAP's decision, the Ninth Circuit held that the proceeds of the sale of the house, less the Debtor's homestead exemption, properly belonged to the estate. *Hyman*, 967 F.2d at 1321.

The debtors in *Hyman* included selling costs in their analysis of the amount of equity in the property. Debtors then argued that there was no equity over and above the liens plus selling costs and the debtors' state law homestead exemption, and therefore, the estate had no interest in the property. The Ninth Circuit held that selling costs were not properly included in the equity calculation, and the estate was entitled to the post-petition appreciation in the house. *Hyman*, 967 F.2d at 1320.

In the instant case, selling costs are not at issue and, based upon the Court's determination that the Debtor's residence was worth $259,000 on the petition date, there clearly was no equity for the estate on the petition date.

More importantly, the rationales of *Hyman* and *Reed*, holding that post-petition appreciation benefits the estate, do not hinge upon the issue of whether there was equity for the estate on the petition date. These case,s turned largely on interpretation of California's homestead exemption statute, Cal. Civ. Proc. Code §704.710(c), and 11 U.S.C. § 541(a) and 541(a)(6). See *Hyman*, 967 F.2d at 1318, and *Reed*, 940 F.2d at 1323. They do not hold that the issue of whether a debtor or the trustee is entitled to post-petition appreciation is determined by whether there was equity for the debtor or for the estate on the petition date.

The recent BAP decision *In re Bronner*, 135 B.R. 645 (Bankr. 9th Cir. 1992) is consistent with the Court's analysis in the instant case. *In Bronner*, the BAP addressed the issue of whether the estate is entitled to post-petition "appreciation" of the value of a bad faith lawsuit. The debtors had claimed that the lawsuit was worth $6,000 and included that amount in their exemptions, which were limited to a total of $15,800. The lawsuit was eventually settled for $35,000. After attorneys fees were paid, a balance Of $19,484 was left in the trustee's possession. The debtors moved for an order compelling the trustee to turn over the proceeds from the lawsuit based on the argument that the property had re-vested in them when there was no objection to the claimed exemption.

The court denied the motion.

The BAP affirmed the court's denial of the motion because the exemption claimed by the debtors was limited to a maximum dollar amount ($15,800). *Id.* at 648. The court then compared the facts of *Bronner* to a homestead exemption, which is at issue in this case. The court noted:

> An exemption claimed in a lawsuit that is property of the estate is comparable to a homestead exemption. The homestead exemption is merely a debtor's right to' retain a certain sum of money when the court orders a sale of the homestead; it is not an absolute right to retain the homestead itself. (Citations omitted]. Once a debtor is allowed the exemption, a property right to the amount of the all, from the sale-proceeds of estate property re-vests in the debtor and is no longer part of the estate. [Citation omitted). *Thus, the excess value above the encumbrances and the exemption amount is availailable to creditors. Id.*(emphasis added).

Bronner supports both Debtor's claim to his homestead exemption and the Trustee's claim to all post-petition appreciation above the homestead in the instant casse. In *Bronner*, the BAP stated that the homestead exemption "revests" in a debtor and passes out of the estate and that the "excess value" is available to creditors. While *Bronner* is distinguishable from the case at bar the court noted that the value of the lawsuit did not appreciate, but "possessed an inherent value," Id. at 1240, whereas Debtor's house in the case at bar did appreciate) and the discussion in *Bronner* of the homestead exemption was dicta, the language and logic of *Bronner* are squarely consistent with the instant decision.

Finally, it should be noted that in situations like this one, where there is no equity for the estate on the petition date, or at a point in time thereafter, a debtor can always file a motion to compel the trustee to abandon the property to the debtor. Once the formal abandonment occurs, the debtor, not the estate, is entitled to all post-petition appreciation.

V. Conclusion

The Trustee represents that the estate now contains $129,000, $115,682 of which is Post-petition appreciation of the house. The Trustee argues the funds should be distributed under Bankruptcy Code §724, which deals with how certain liens are treated. The Court need not, and does not, reach the merits of the Trustee's proposed distribution on this motion to compel abandonment. (8)

The Court finds that the house was worth $259,000 at the time the petition was filed. The estate is ordered to abandon its interest in $45,000 of the sale proceeds now held by the Trustee and to disburse $45,000 to the Debtor to be held by Debtor's counsel in a trust account. Any proceeds of sale in excess Of the consensual lien plus the homestead exemption amount of $45,000 attributable to Post-petition appreciation enure to the estate.

Debtor's motion to compel abandonment is granted in part, and denied in part. This decision constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

Counsel for the Debtor shall submit a proposed order consistent; with the Court's decision.

DATED: 9/30/92
ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

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(8) That matter includes the question of whether the Trustee is entitled@ to be paid for administering an asset which had no value for the estate on the petition date.

SECTION 522 (11 U.S.C. § 522)

§ 522. Exemptions.

(a) In this section—

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

BEST AVAILABLE COPY

The Estate

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

SECTION 544 (11 U.S.C. § 544)

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable

CIVIL PROCEDURE—BANKRUPTCY—HOMESTEAD EXEMPTION

CHAPTER 1111

S.B. No. 651

AN ACT to amend Section 703.140 of the Code of Civil Procedure, relating to bankruptcy, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 10, 1993.]

[Filed with Secretary of State October 11, 1993.]

LEGISLATIVE COUNSEL'S DIGEST

SB 651, Kopp. Bankruptcy: exemptions.

Existing law sets forth the exemptions available in bankruptcy, as specified.

This bill would provide that the homestead exemption is available regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure. The bill would also state that it is declaratory of existing law, and specify the findings and declarations of the Legislature in this regard.

The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 703.140 of the Code of Civil Procedure is amended to read:

703.140. (a) * * * In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter including the homestead exemption, other than the provisions of subdivision (b) * * * are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(2)

No. 95-1398

Supreme Court, U.S.
FILED
APR 1 1996

In The

Supreme Court of the United States

October Term 1995

TERRY ALSBERG dba ALSBERG BROTHERS BOATWORKS,

Petitioner,

vs.

JEROME E. ROBERTSON, Chapter 7 Trustee of the Bankruptcy Estate of TERRY ALSBERG dba ALSBERG BROTHERS BOATWORKS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

QUESTION PRESENTED

Under the California homestead exemption statute, is a debtor under the Bankruptcy Code entitled to exempt a monetary interest in a homestead greater than the amount allowed by the state law?

LIST OF PARTIES

Jerome E. Robertson, as Trustee and Respondent, does not disagree with the list of parties set forth in the petition for writ of certiorari submitted by the petitioner.

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STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 522(a) (Reproduced in Petition)

11 U.S.C. § 522(b) (Reproduced in Petition)

11 U.S.C. § 724(b)

26 U.S.C. § 6321

California Code of Civil Procedure § 703.130 (West 1984)

California Code of Civil Procedure § 703.140(a) (West 1984)

California Code of Civil Procedure § 704.730(a)(2) (West 1986)

STATEMENT OF THE CASE

This case begins and ends with the interpretation of the homestead exemption statutes of the State of California. The law of no other state or circuit is applicable in this case; the Court has previously denied certiorari on the issue presented.

The petition before this Court involves the effect in bankruptcy of California's generous homestead exemption statutes; it does not involve questions of national significance or conflicts among the circuits or states. The issue is a matter governed by California law.

Most simply stated, the question for this Court is whether Mr. Alsberg's late claim of exemption of $45,000 (the amount allowed by the California statute) in his homestead actually entitled him to all of the over $100,000 in cash proceeds of the sale of the residence.

The Bankruptcy Code (Title 11 of the United States Code) provides that an individual debtor may claim that certain property interests are "exempt" from bankruptcy, *i.e.*, the debtor may retain those interests despite the bankruptcy. Bankruptcy Code Section 522(b)(1) provides that the states may (1) authorize debtors filing for bankruptcy protection to select the federal exemption scheme set forth in Section 522(d), or (2) "opt out" of the federal exemption scheme and require debtors within its boundaries to look to the exemptions provided by state law. The exemptions provided under the state law may be more or less generous than the federal exemptions provided by the Bankruptcy Code itself; California, for example, provides a homestead exemption that is far more generous that the homestead exemption provided by the Bankruptcy Code.

By enacting Section 703.130 of the California Code of Civil Procedure ("CCP"), California elected to "opt out" of the federal exemption scheme. In enacting CCP Section 703.140(a), California provided that debtors in bankruptcy may elect (1) the exemptions provided throughout the CCP (such as the $45,000 homestead exemption provided by CCP Section 704.730(a)), or (2) a set of exemptions specified in CCP Section 703.140 that mirrors the federal exemptions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. Alsberg's recitation of the facts and statement of the case are incomplete. Therefore, Respondent restates the facts, largely paraphrasing the Ninth Circuit's recitation of facts in the opinion below. (Alsberg's reproduction of the Ninth Circuit's opinion omitted part of the factual summary; the complete opinion is reprinted in the Appendix to this brief.)

Mr. Alsberg filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 29, 1987. At that

time, he owned and occupied a residence in Santa Cruz, California, but he did not claim a homestead exemption in it. At the time of filing, the residence was encumbered by a promissory note secured by a deed of trust for $225,000 (the "mortgage"), federal tax liens of approximately $80,000, and local tax liens of approximately $6,000. In the proceeding below, the Bankruptcy Court determined that the residence was worth $259,000 at the time of filing. When Alsberg filed his Chapter 11 petition, he could have claimed a homestead exemption of $45,000 in the residence under the version of CCP Section 704.730(a)(2) in effect at the time of filing, but he did not do so.

On February 4, 1988, Alsberg filed Amended Bankruptcy Schedules A and B; these schedules are used for disclosure of debts, assets, and exemptions. Alsberg did not claim a homestead exemption at that time. In August 1988, while Alsberg was still a Chapter 11 debtor-in-possession and in control of the bankruptcy case, he entered into an agreement to sell the residence for $380,000 and moved the Bankruptcy Court for approval of the sale. On September 28, 1988, the Bankruptcy Court held a hearing on Alsberg's sale motion. Heard the same day was a motion by certain creditors to convert the case to a Chapter 7 proceeding. The court converted the case to a Chapter 7 liquidation and ordered the motion for approval of the sale held in abeyance pending review by the newly-appointed trustee, Jerome Robertson, the Respondent. The Respondent determined that the terms of the sale were adequate but that Alsberg's motion was defective. Accordingly, the Respondent filed his own motion for approval of the sale free and clear of liens. The motion was granted on October 28, 1988; escrow closed on November 1, 1988. The proceeds of sale amounted to approximately $115,000 after payment of the mortgage and applicable costs of sale.

On January 24, 1989 (*i.e.*, approximately three months after

the sale had closed), Alsberg filed a schedule of exemptions (known as Schedule B-4) along with other amended and supplemental schedules, claiming for the first time a homestead exemption of $45,000, the maximum amount permitted by the California statute. At that time, the residence had already been sold and only the cash proceeds of sale existed.

In October 1991, Alsberg moved the Court for an order under 11 U.S.C. § 554 compelling the Respondent to abandon all of the proceeds of sale (*i.e.*, $115,000) to him, arguing that the bankruptcy estate was not entitled to any proceeds of sale. Alsberg asserted that he personally should receive all proceeds of sale including the post-petition appreciation in the value of the residence. Alsberg argued that the combination of the mortgage of $225,125 plus the homestead exemption of $45,000 exceeded the value of the residence at the time of filing ($259,000), and that his post-sale exemption claim had retroactively removed the residence itself from the bankruptcy estate on May 29, 1987, the date he filed the Chapter 11 petition. In his motion, Alsberg ignored the existence of the tax liens (against which a homestead exemption is not effective). The mortgage and tax liens at the time of filing totalled approximately $311,000, leaving Alsberg with no equity at the filing date. The bankruptcy estate, however, had and maintained an interest in the property by virtue of Bankruptcy Code Section 724(b) which automatically subordinates tax liens to certain priority claims against the bankruptcy estate.

The Bankruptcy Court determined under existing Ninth Circuit authority that (1) Alsberg was entitled to a $45,000 homestead exemption; (2) the property was worth $259,000 at the time of the filing; (3) the tax liens were irrelevant to a determination of the amount allowable as a homestead exemption; and (4) the estate was entitled to any appreciation in the value of the residence between the time of the filing and the

time of sale over and above the amount of the homestead exemption allowed under California law. The Bankruptcy Court further found that the bankruptcy estate had an interest in the residence when Alsberg filed bankruptcy and maintained that interest through the time of sale.

The Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals affirmed the Bankruptcy Court's ruling, holding that the bankruptcy estate was entitled to all post-petition appreciation in the property, but that Alsberg was entitled to $45,000 of the sale proceeds as his homestead exemption.

The Ninth Circuit Court of Appeals affirmed the Bankruptcy Appellate Panel, holding that the case was controlled by the rule enunciated in *Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316 (9th Cir. 1992).

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS RECENTLY DENIED PETITIONS IN CASES INVOLVING THE SAME CALIFORNIA STATUTE.

This Court has recently denied two petitions for writs of certiorari filed in cases decided by the Ninth Circuit on the homestead exemption statute that is the subject of the present petition. *Seror v. Kahan (In re Kahan)*, 28 F.3d 79 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1100, 130 L. Ed. 1067 (1995); *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1029 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1695, 131 L. Ed. 559 (1995).

There is nothing to distinguish the present petition from those that have been denied.

II.

THERE IS NO CONFLICT OF AUTHORITY.

The Petitioner has attempted to manufacture an argument that the Ninth Circuit's decision in this case conflicts with decisions of this Court, other circuits, and even the Ninth Circuit itself. There is no such conflict. The Ninth Circuit's decision below is consistent with the decision in *In re Hyman* cited by the Ninth Circuit as controlling and also several other Ninth Circuit cases dealing with the California homestead exemption statute. Those decisions are cited later in this Opposition Brief. The decisions uniformly hold that the "homestead exemption" provided by California law is a fixed dollar amount generated from the sale of the homestead and that debtors in bankruptcy are not entitled to keep post-petition appreciation beyond the fixed dollar amount allowed by law.

In order to manufacture conflicts of authority, Petitioner mischaracterizes the issues and arguments considered by the three courts below. The decisions rendered thus far in this case are based on the California homestead law alone.

The Respondent strongly disagrees with the Petitioner's characterization of the "essential question" presented in this case and his recitation of the issues involved. The Petitioner asserts that the "essential question" is the relationship between Bankruptcy Code Section 522(a) (a definitional provision that states that "value" as used in Section 522 means fair market value on the date the petition was filed) and Section 522(b) which permits a debtor to claim certain exemptions as provided by, in this case, California law.

Although the Respondent finds it difficult to follow Petitioner's argument, it appears that Petitioner is arguing that

the principle of "cleavage" (*i.e.*, that the petition filing date determines the rights of all parties regarding property and its value) as enunciated in cases such as *White v. Stamp*, 266 U.S. 310, 313 (1924) and *Myers v. Matley*, 310 U.S. 622, 628 (1943) requires the Court to conclude that the Petitioner retroactively removed the residence itself from the bankruptcy estate after it was sold because its value at the petition date was insufficient to satisfy both the mortgage ($225,000) and the $45,000 homestead exemption. Once again the Petitioner ignores the tax liens ($86,000) which render the homestead exemption valueless as of the petition date because there was no "equity" to which the homestead exemption could attach. He also ignores California law which governs substantive issues regarding claimed homestead exemptions. *In re Moffat*, 107 B.R. 255, 258 (Bankr. C.D. Cal. 1989), *aff'd*, 119 B.R. 201 (9th Cir. BAP 1990), *aff'd*, 959 F.2d 740 (9th Cir. 1992).

The Petitioner also ignores the federal law regarding exemptions and federal tax liens. Section 6321 of the Internal Revenue Code (26 U.S.C. § 6321) creates a lien for unpaid taxes in favor of the United States upon "all property and rights to property" of the debtor. *In re Raihl*, 152 B.R. 613, 617 (9th Cir. BAP 1993). A state homestead exemption is ineffective against a federal tax lien. *United States v. Heffron*, 156 F.2d 657 (9th Cir. 1947).

If one follows the Petitioner's reasoning that the value of his exemption was fixed at the petition date, one must conclude that he is entitled to no homestead exemption at all because of the lack of any equity due to the mortgage and tax liens. Under his own reasoning, granting him an exemption of any kind would be legally unjustified.

The question at issue, however, is not the effect of "cleavage" but whether under California law a debtor can

exempt more than the law allows. There is no conflict on this issue. The decisions in the Ninth Circuit on the California statute have been consistent and clear: a debtor can only exempt the dollar amount allowed by the statute; he or she is not entitled to exempt the homestead itself or to reap a windfall of post-petition appreciation beyond the allowed exemption amount to the detriment of his or her creditors. The issue is settled in California, and this Court has denied certiorari on two recent cases addressing the issue as noted in Section I above.

In the opinion below, the Ninth Circuit cited *Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316 (9th Cir. 1992), as controlling and noted that the issue argued in the present case is closed. In a footnote in the opinion below, the Ninth Circuit referred to its earlier opinion in *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1028, 1030 n.2 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1695, 131 L. Ed. 559 (1995), for the statement that the "argument that a homestead exemption operates to remove the residence itself from the bankruptcy estate 'is now deemed foreclosed in this circuit.' " *Alsberg*, 68 F.3d 312, 314-15 n.2 (9th Cir. 1995). The Ninth Circuit further explained that "(a)ll the cases in which we have considered this argument have relied upon provisions of California statutory homestead exemption. We have yet to consider this argument as applied to the homestead exemption statutes of other states in this circuit." *Alsberg*, 68 F.3d at 314-15 n.2.

The Ninth Circuit could also have cited *Seror v. Kahan (In re Kahan)*, 28 F.3d 79 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1100, 130 L. Ed. 1067 (1995), and *Schwaber v. Reed (In re Reed)*, 940 F.2d 1317 (9th Cir. 1991), both of which stand for the proposition that a claim of exemption under the California statute exempts a dollar value in the homestead not the homestead itself. "As we noted in *Reed*, Cal. Civ. Proc. Code § 704.730 merely gives debtors the right to a specified amount

of money after a forced sale; it does not give debtors 'an absolute right to retain the homestead itself.' " *Bernard*, 40 F.3d at 1030 n.2.

The *Bernard* panel stated that this line of argument is deemed foreclosed in the Ninth Circuit and referred the reader to Rule 38 of the Federal Rules of Appellate Procedure and Rule 9011 of the Federal Rules of Bankruptcy Procedure, both of which provide for sanctions for, among other things, frivolous pleadings and arguments.

Despite this admonition, the Petitioner asserts that the issue is not settled and argues that there is in fact a conflict within the Ninth Circuit itself. As evidence of a conflict, the Petitioner cites the Ninth Circuit's vacated opinion in *Rigby v. Hall (In re Hall)*, 1 F.3d. 853 (9th Cir. 1993), *vacated*, 41 F.3d 502, *superseded* 42 F.3d 1399 (9th Cir. 1994). *Hall* was based on the Washington homestead statute. The Petitioner's statement that "the appearance of conflict [within the circuit on this issue] caused the decision in *In re Hall*, 1 F.3d (9th Cir. 1993) . . . to be withdrawn" is, to the best of the Respondent's knowledge, unsupported by anything in the record. There is nothing in the order vacating the opinion that indicates a reason for its having been vacated. Respondent does not recall anything stated by the Panel at oral argument indicating the basis for vacating *Hall*. Regardless of the reason for vacating *Hall* the *Hall* decision was based on a Washington homestead statute, not a California statute. Even if *Hall* were still viable authority, there would be no real conflict because its subject was the law of a different state from that considered in the other Ninth Circuit opinions and in this case. The Petitioner cites no conflict within the Ninth Circuit on interpretation of the California statute; there is none.

III.

THE 1993 AMENDMENT OF THE CALIFORNIA STATUTE IS IRRELEVANT.

The Petitioner attempts to argue that the court should interpret CCP § 703.140 as amended by the California legislature in 1993. The Respondent asserts that the changes made in the statute in 1993 are irrelevant to the dispute before this Court and that the statute in effect in 1987 when Alsberg filed his bankruptcy petition is the proper statute to apply. The 1993 amendments to CCP § 703.140 were designed specifically to address the ruling in *In re Pladson*, 154 B.R. 305 (N.D. Cal. 1993), *rev'd*, 35 F.3d 462 (9th Cir. 1994) in which the district court held that homestead exemptions were not available at all to a debtor in bankruptcy. The *Pladson* decision was based on certain language in the statute that was construed to mean that exemptions were available exclusively in the context of execution of judgments. The California legislature, in effect, reversed that ruling by stating that California law had always provided for a homestead exemption in the bankruptcy context.

The Respondent is not disputing that homestead exemptions are available in bankruptcy. However, the change in statute is irrelevant to this case.

CONCLUSION

This case involves an individual debtor in a unique factual situation who has attempted to remove from a bankruptcy estate more than the California homestead exemption statutes allow. The Court has already denied certiorari in cases raising this issue of state law. This petition should also be denied.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED OCTOBER 11, 1995

In re Terry ALSBERG, dba Alsberg Brothers Boatworks, Debtor.

Terry ALSBERG, dba Alsberg Brothers Boatworks, Appellant,

v.

Jerome E. ROBERTSON, Chapter 7 Trustee, Appellee.

No. 94-15085.
BAP No. NC-92-2318-JAsO.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 11, 1995.

Decided Oct. 11, 1995.

* * *

Henry G. Rendler, San Jose, CA, for appellant.

Charles P. Maher, Rosenblum, Parish & Isaacs, San Francisco, CA, for appellee.

Appeal from the Bankruptcy Appellate Panel for the Ninth Circuit.

Appendix A

Before: BEEZER and THOMPSON, Circuit Judges, and JUSTIN L. QUACKENBUSH, District Judge.*

BEEZER, Circuit Judge.

Debtor Terry Alsberg, dba Alsberg Brothers Boatworks, ("Alsberg") appeals the Bankruptcy Appellate Panel's ("the BAP") decision that Alsberg is entitled only to the $45,000 homestead exemption allowed under California law from proceeds from the sale of his residence. Alsberg argued to the BAP that he was additionally entitled to the value of post-bankruptcy-petition appreciation in the value of his residence. The BAP held that such appreciation accrued to the bankruptcy estate.

The BAP had jurisdiction pursuant to 28 U.S.C. § 158(b), and we have jurisdiction pursuant to 28 U.S.C. §§ 158(c) and (d). We affirm.

I

Alsberg filed for Chapter 11 bankruptcy on May 29, 1987. At that time he owned and occupied a residence in Santa Cruz, California ("the residence"). As determined by the bankruptcy court and the BAP, the residence was worth $259,000 at the time of filing. At the time of filing, the residence was encumbered by a promissory note secured by a deed of trust for $225,125 ("the mortgage") and tax liens totalling approximately $86,000.[1]

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* The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

1. The trustee, Jerome Robertson, asserts that the tax liens may operate to

(Cont'd)

Appendix A

Under the versions of 11 U.S.C. § 522(b)(2)(A) and California Code of Civil Procedure § 704.730(a)(2) in effect at the time of filing, Alsberg was entitled to claim a homestead exemption of $45,000 on the residence.

On February 4, 1988, Alsberg filed amended Schedules A and B. The amended schedules of February 4, 1988 do not include a schedule B-4, the schedule for claiming exemptions.

In August 1988, Alsberg entered into an agreement to sell the residence for $380,000 and moved for court approval of the sale. On September 28, 1988, the bankruptcy court heard Alsberg's motion concurrently with a motion to convert the case to a Chapter 7 bankruptcy. The court converted the case to Chapter 7 and ordered the motion for approval of sale held in abeyance pending review by the trustee, Jerome Robertson ("Robertson"). Robertson determined that the sale should go forward, but that Alsberg's motion was defective. Accordingly, Robertson moved for approval of the sale. The motion was granted on October 28, 1988 and escrow closed on November 1, 1988. The proceeds of the sale amounted to approximately $115,000, after payment of the mortgage, applicable costs of sale and capital gains tax.

On January 24, 1989, Alsberg filed an Amended B-4 schedule, along with other amended and supplemental schedules. In the January 24, 1989, B-4 Schedule, for the first

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impair Alsberg's right to a $45,000 homestead exemption. We do not consider the issues raised by the existence of the tax liens, because the parties agreed at a hearing before the bankruptcy court to reserve the question of the rights of the IRS, the County of Santa Cruz, and wage claimants.

time, Alsberg claimed a homestead exemption of $45,000. Only the proceeds of the sale of the residence existed at this time.

In October 1991, Alsberg moved to compel Robertson to abandon the proceeds of the sale, arguing that because the amount owed on the mortgage ($225,125), plus the homestead exemption ($45,000), exceeded the value of the residence at the time of filing ($259,000), the residence was effectively removed from the bankruptcy estate at the time of filing. Accordingly, Alsberg concluded that the estate was not entitled to any of the proceeds of the sale, and instead, he should receive them. The bankruptcy court determined that (1) Alsberg was entitled to a homestead exemption of $45,000; (2) the property was worth $259,000 at the time of filing; (3) the tax liens were irrelevant to a determination of the amount allowable as a homestead exemption; and (4) because the estate had an interest in the residence when Alsberg filed bankruptcy, and maintained that interest through the time of sale, the estate was entitled to any appreciation in the value of the residence between the time of filing and the time of sale.

Both Alsberg and Robertson appealed to the BAP. The BAP affirmed, holding that the estate was entitled to all post-bankruptcy-petition appreciation in the property, but that Alsberg was entitled to $45;000 of the sale proceeds as his homestead exemption.

Alsberg timely appeals.

II

We review de novo decisions of the BAP. *Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 326 (9th Cir. 1994). We

review, as does the BAP, the bankruptcy court's conclusions of law de novo and its findings of fact under the clearly erroneous standard. *Id.*

III

Under the Bankruptcy Code, 11 U.S.C. § 522(b)(2)(A), a debtor may claim a homestead exemption for his residence, and the amount of the exemption may be determined by state law. California Code of Civil Procedure § 704.730(a)(2) sets the amount at $45,000 for debtor-homeowners in Alsberg's circumstances.

Alsberg argues that an aggregate $33,875 interest in the residence became the property of the bankruptcy estate on the date of filing the bankruptcy petition. This sum represents $259,000 market value at the time the petition was filed, less a note for $225,125 secured by a deed of trust. He contends that the $45,000 homestead exemption was effective, apparently automatically, immediately after filing. Alsberg also contends that the homestead exemption operated to move the $33,875 interest out of the bankruptcy estate, leaving the estate with no interest in the residence after the date of filing the bankruptcy petition. Alsberg concludes that because the estate had no interest in the residence after the date of filing the bankruptcy petition, the estate is not entitled to post-bankruptcy-petition appreciation.

This case is controlled by the rule enunciated in *Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316 (9th Cir. 1992).[2] Alsberg

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2. We recently stated in *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1028, 1030 n. 2 (9th Cir. 1994) that the argument that a homestead exemption operates

(Cont'd)

relies heavily on *Rigby v. Hall (In re Hall)*, 1 F.3d 853 (9th Cir. 1993). That opinion, however, has been withdrawn and vacated, and is no longer controlling precedent, *In re Hall*, 1 F.3d 853 (9th Cir. 1993), *withdrawn and vacated*, 41 F.3d 502 (9th Cir. 1994), *superseded by* 42 F.3d 1399 (9th Cir. 1994).

In *In re Hyman*, the Hymans, residents of California, owned a residence valued at $415,000 at the time of filing the bankruptcy petition. The residence was encumbered by approximately $348,000 in liens, resulting in a net equity of approximately $67,000. The Hymans claimed a $45,000 homestead exemption. The bankruptcy court approved the trustee's motion for permission to sell the Hymans' residence. The Hymans sought declaratory relief, claiming, among other things, that they were entitled to all post-bankruptcy-petition appreciation in their residence. We held:

> [T]he Hymans' claim for appreciation is without merit. The California statute gives the Hymans a $45,000 exemption as of the time of sale, not a $45,000 equity in the property. . . . Only in the bankruptcy context, where an appreciable period of time usually passes between filing of the petition and sale of the property, can the property rise or fall in value. . . . The debtor's right to use the

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(Cont'd)
to remove the residence itself from the bankruptcy estate "is now deemed foreclosed in this circuit." All the cases in which we have considered this argument have relied upon provisions of the California statutory homestead exemption. We have yet to consider this argument as applied to the homestead exemption statutes of other states in this circuit.

> exemption comes into play not upon the filing of the petition, but only if and when the trustee attempts to sell the property.

In re Hyman, 967 F.2d at 1321.

When the original bankruptcy petition was filed, Alsberg's interest in the residence passed to the bankruptcy estate. Alsberg's California homestead exemption can be realized only from the net proceeds of sale received by the estate. The estate held an interest in the residence at all times after the petition was filed. Therefore, when the residence was sold, the proceeds of the sale vested in the estate. When Alsberg subsequently filed a claim for a $45,000 homestead exemption after the sale of the property, he became entitled to $45,000 of the proceeds, and no more

AFFIRMED.

APPENDIX B — RELEVANT STATUTES

SECTION 724 (11 U.S.C. § 724)

§ 724. Treatment of certain liens.

(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed —

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in sections 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), of 507(a)(6) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1954 (26 U.S.C. § 6323) shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

INTERNAL REVENUE CODE § 6321

26 U.S.C. § 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(Aug. 16, 1954, c. 736, 68A Stat. 779.)

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 703.130. Federal bankruptcy exemptions; not authorized

Pursuant to the authority of paragraph (1) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11

of the United States Code (Bankruptcy) are not authorized in this state.

(Added by Stats. 1984, c. 218, § 1.5.)

§ 703.140. Federal bankruptcy; applicable exemptions

(a) If a petition is filed under Title 11 of the United States Code, the exemptions provided by this chapter other than the provisions of subdivision (b) of this section shall be applicable, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that

person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed one thousand two hundred dollars ($1,200) in value, in one motor vehicle.

(3) The debtor's interest, not to exceed two hundred dollars ($200) in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed five hundred dollars ($500) in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed in value four hundred dollars ($400) plus any unused amount of the exemption provided under paragraph (1), in any property.

(6) The debtor's aggregate interest, not to exceed seven hundred fifty dollars ($750) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value four thousand dollars ($4,000) in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive any of the following:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit.

(B) A veterans' benefit.

(C) A disability, illness, or unemployment benefit.

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(E) A payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent

reasonably necessary for the support of the debtor and any dependent of the debtor, unless all of the following apply:

(i) That plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose.

(ii) The payment is on account of age or length of service.

(iii) That plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954.

(11) The debtor's right to receive, or property that is traceable to, any of the following:

(A) An award under a crime victim's reparation law.

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(D) A payment, not to exceed seven thousand five hundred dollars ($7,500), on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(Added by Stats. 1984, c. 218, § 2.)

§ 704.730.* Amount of homestead exemption

(a) The amount of the homestead exemption is one of the following:

(1) Thirty thousand dollars ($30,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) Forty-five thousand dollars ($45,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) Sixty thousand dollars ($60,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead either a person 65 years of age or older, or a person physically or mentally disabled and as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving

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* Applicable on 5/29/97.

disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, or subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

(Added by Stats. 1982, c. 1364, p. 5165, § 2, operative July 1, 1983. Amended by Stats. 1984, c. 454, § 1; Stats. 1986, c. 1000, § 1; Stats. 1986, c. 1001, § 1.)

(3)

Supreme Court, U.S.
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No.95-1398

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

TERRY ALSBERG, dba Alsberg Brothers Boatworks

Petitioner,

vs.

JEROME E. ROBERTSON

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Petitioner summarizes respondent's arguments in his Opposition Brief as follows:

1. Petitioner is seeking more than the allowed value of the California Exemption.

2. Use of a single date of cleavage to determine exemption rights is not applicable here because petitioner's claim of exemption was not filed contemporaneously with the original bankruptcy petition.

3. Petitioner is not entitled to a homestead exemption if tax liens consume the debtor's equitable interest.

4. Under Title 11 of the United States Code, California law intends to and is allowed to determine the value of exempt property on a date other than the date of filing.

5. This is simply a matter of California Law and there is no conflict among the Circuits.

II. DISCUSSION

Respondent's brief attempts to rephrase the question in this case from one of time, to one of amount. Yet, the amount ($33,875) of the debtor's interest on date of filing is known, as is the amount ($115,000) on date of sale. No one disputes these amounts. The dispute has been and remains one of time. The question remains: Are the rights of a debtor and an estate, to property in which an exemption is claimed, fixed as of the date of sale or as of the filing date? Respondent stands with the 9th Circuit: that it is date of sale. Petitioner stands with the Congress, this court, and the 3rd, 4th, 5th, 7th and 10th Circuits: that it is the date of filing that controls. Following is a point by point discussion of respondent's arguments:

1. The value of petitioner's exemption.

The Congress spoke with utmost clarity regarding time and exemptions in 11 USC §522, titled: "Exemptions":

> "In this section--"value" means fair market value as of the date of the filing of the petition..." 11 USC §522(a)(2)

Therefore, by definition, any discussion of exemption rights must begin and end with that value and no other. The leading treatises have discussed the impact of this definition on bankruptcy administration in a consistent fashion:

> "The key date for exemptions is the date of the petition for relief. Rights to exemptions are fixed as of that date." (*Cowans Bankruptcy law and Practice*, Sixth Edition, 1994, Vol. 2, pg. 132.)

> "When exemptions are claimed, therefore, the fact that the value of the property that the debtor seeks to exempt has changed since the filing of the petition will not affect the amount of such property that the debtor may exempt." (*Collier on Bankruptcy*, 15th edition, 1989, Vol. 3, pg. 522-15.)

The conspicuous omission in respondent's brief of any discussion of §522(a)(2) or the $33,875 value as of the filing date, suggests that respondent believes Congress does not mean what it says or has not said what it means.

Petitioner's position has always been, and remains simply this: He asserts that he is entitled to exempt the aggregate of legal and equitable interests in his home, valued at $33,875, effective as of the date of filing. No more, no less.

Petitioner has never asserted that he is entitled to exempt an amount in excess of $100,000, as respondent erroneously claims, or even the $45,000 amount that the bankruptcy court provided. To do so would be in obvious conflict with this court's holding:

> "§522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate cannot be exempted. Thus if a debtor holds only bare title to his house -- if, for example, the house is subject to a purchase-money mortgage for its full value -- then only that legal interest passes to the estate.....Legal title will pass, and can be the subject of an exemption." *(Owen v. Owen*, 500 U.S. 305, 308-309 (1991))

Petitioner's position is clearly consistent with the holding in *Owen*. By definition, value on date of sale, or for that matter any other date, is irrelevant in the determination of exemption rights in the context of a bankruptcy.

2. Relevance of a B-4 schedule to the cleavage date.

It is difficult to understand the point that respondent is making in discussing petitioner's B-4 schedule. The bankruptcy court found the exemption to be properly claimed. Respondent has never objected to the allowance of the exemption. He cites no statutory or case law for his argument that a delay in filing a B-4 schedule somehow affects the date of cleavage or makes the definition contained in §522(a)(2) irrelevant. Virtually all on point case law reinforces the conclusion that the exact time that an exemption is claimed is

irrelevant to the determination of the date of cleavage. (See e.g. *In re Magallanes* , 96 B.R. 253 (9th Cir BAP 1988).

3. Relevance of tax liens.

The existence of tax liens in no way prevents petitioner from using his exemption in this case. Even if it were held that the tax liens consumed the entirety of the petitioner's equitable interests, by this court's holding in *Owen v. Owen, supra,* 500 U.S. 305, 308-309, petitioner's legal interest in the bare title, by itself, could be exempted.

4. Issues of California homestead exemption

Examination of the 9th Circuit's recent interpretations of the California homestead exemption, as used in bankruptcy, is beyond the scope of this reply. It must suffice to note, that the 9th Circuit has gone so far, in *In re Bernard*, 40 F.3d 1028 (9th Cir. 1994), as to hold that: the homestead exemption cannot exempt the "residence itself" from the estate.

By definition, the homestead is the debtor's residence, This latest iteration of 9th Circuit opinion paradoxically disallows the use of the "homestead exemption" to exempt a homestead. The homestead exemption's historical purpose has been to prevent the court ordered sale of a debtor's home. Yet, the 9th Circuit, alone among the Circuits, has held that the homestead must be sold before it can be exempt. The fact that California elected to limit homesteads exempted from sale, to those with a net value less than $45,000, does not alter the tautologous nature of petitioner's simple contention that homestead exemptions in fact can have the effect of exempting a homestead. The 9th Circuit is in conflict with that tautology.

Regardless, the question of whether or not the California exemption can exempt the homestead itself, by strict construction, is irrelevant. §541(a)(1) and the holding in *Owen v. Owen, supra,* 500 U.S. 305, 308-309, establish that when a homestead is encumbered, only the debtor's net interests come into an estate, not the "residence itself".

In the instant case, interests valued at $33,875 came into the estate. Subsequently, interests valued at $33,875 were exempted from the estate. The estate's interest, along with respondent's right to administer any sale of the home disappeared into nullity, as of the filing date. Any other conclusion is legally and mathematically indefensible.

Respondent's argument that California Code of Civil Procedure §703.140, as clarified by California Senate Bill 651, is not applicable to the current case is simply a misstatement of legislative intent as clearly espoused in that bill. The entire bill is reprinted in the appendix at pg. A4. It specifically states at Section 2:

> "The Legislature finds and declares that the amendment of Section 703.140 of the Code of Civil Procedure by Section 1 of this act pertaining to exemptions in bankruptcy is not a change in, but is declaratory of, existing law." (S.B. 651)

The sole purpose for passing this legislation was to aid the federal courts in interpreting California's legislative intent as it has always existed. As respondent correctly states that intent at page 10 of his brief, "... California law has always provided for a homestead exemption in the bankruptcy context.". The bankruptcy context, of course, includes the

requirements of time contained in §522(a)(2) which applies in all fifty states. California did not and cannot opt out of the requirements of §522(a)(2). Furthermore, S.B. 651 states with utmost clarity that a sale by any procedure is not necessary and irrelevant to the use of the California exemption in bankruptcy. As with the Congress, apparently respondent believes that the California legislature does not mean what it says or has not said what it means.

5. Conflicts in this case go far beyond California law.

Respondent contends that this is a simple matter of California law and that the 9th Circuit's decision, basing exemption rights on conditions in effect on date of sale, does not conflict with decisions of this court or the other circuits. Yet, this court's decision in *White v. Stump*, is in direct and obvious conflict with the 9th Circuit's holding:

> "When the law speaks of property which is exempt and of rights to exemption, it, of course, refers to some point of time. In our opinion, this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show -- some expressly and others impliedly -- that one common point of time is intended, and that it is the date of the filing of the petition." (emphasis added) (*White v.Stump*, 266 U.S. 310, 313 (1924))

Respondent entirely ignores the numerous cases cited from this court and the 3rd, 4th, 5th, 7th and 10th Circuits, in

the Petition for Writ Certiorari, as evidence of uniform conflict with the 9th Circuit's decision here.

Petitioner cited the *Matter of Sherbahn,* 170 B.R. 137 (N.D.Indiana 1994) as evidence that the implications of the 9th Circuit's decision here, have already begun to erode use of a single date of cleavage and expand the conflict to cases having nothing to do with nuances of California homestead law.

Use of a single date, the date of filing, as the date of cleavage for adjudicating exemption rights has heretofore been hornbook law. Respondent's arguments, in like fashion to the 9th Circuit's decision here, are in conflict with this large body of otherwise well settled law.

III. SUMMARY

Over the centuries, bankruptcy law has been refined to a high degree. Use of a single date of cleavage is neither a recent nor arbitrary choice. Its importance to effective case administration derives from three inarguable facts:

A) Exemptions in bankruptcy are essential to a debtor's fresh start.

B) The value of property tends to change with time, because conditions affecting value change with time.

C) The fresh start, itself, may change the conditions affecting value (as was the case here).

Where value affects exemption rights, the timing of those rights must necessarily synchronize with the fresh start. A debtor needs to know that there is a bright line that separates pre-petition affairs from post-petition affairs. The debtor, the creditors and the trustee need to know whether or not the estate has a post-petition interest in the debtor's home based on

conditions that exist at that bright line. As a practical matter, a debtor needs to know if it is the debtor's family or the estate that will benefit from post-petition efforts at paying a mortgage, remodeling a bathroom, painting the homestead etc.

By ignoring the $33,875 filing date valuation, in essence, respondent is arguing that §522(a)(2) is irrelevant. By reducing the language Congress chose to define the nature of exemptions to irrelevance, respondent argues in effect that exemptions themselves are irrelevant. If his arguments and the decision of the 9th Circuit prevail, the heretofore well laid out landscape of bankruptcy becomes a frontier without clear demarcations between exempt property and estate property. It is not an exaggeration to suggest that if the concept of a single bright line of cleavage disappears the benefits of exemptions, as they serve the fresh start intent of the Congress, disappear into confusion.

IV. CONCLUSION

The respondent's brief has not materially addressed the obvious conflict between the 9th Circuit's decision and the relevant Federal statutory language, the decisions of this court, of the Circuit courts and the California legislature's statutory language cited in the Petition for Writ of Certiorari. Therefore, the petition should be granted.

Respectfully submitted,

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No.95-1398

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APPENDIX TO REPLY BRIEF

(11 USC §522 reprinted in relevant part)

SUBCHAPTER II

Debtor's Duties and Benefits

SECTION 522 (11 U.S.C. SS 522)

§522. Exemptions.

(a) In this section-

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(11 USC §541 reprinted in relevant part)

SUBCHAPTER III

The Estate

SECTION 541 (11 U.S.C. SS 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(Subsections (b) and (c)(2) are herein inapplicable)

CIVIL PROCEDURE-BANKRUPTCY-HOMESTEAD EXEMPTION

CHAPTER 1111
S.B. No. 651
AN ACT to amend Section 703.140 of the Code of Civil Procedure, relating to bankruptcy,declaring the urgency thereof, to take effect immediately. .

[Approved by Governor October 10, 1993]
[Filed with Secretary of State October 11, 1993]

LEGISLATIVE COUNSEL'S DIGEST

SB 661, Kopp. Bankruptcy: exemptions.

Existing law sets forth the exemptions available in bankruptcy, as specified.

This bill would provide that the homestead exemption is available regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure. The bill would also state that it is declaratory of existing law, and specify the findings and declarations of the Legislature in this regard.

The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 703.140 of the Code of Civil Procedure is amended to read:

703.140. (a) * * * In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter including the homestead exemption, other than the provisions of subdivision(b) * * * are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, or a burial plot for the debtor of a dependent of the debtor.

(2) The debtor's interest, not to exceed one thousand two hundred dollars ($1,200) in value, in one motor vehicle.

(3) The debtor's interest, not to exceed two hundred dollars ($200) in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed five hundred dollars ($500) in value, in jewelry held primarily

for the personal, family, or household use of the debtor or a dependent.

(5) The debtor's aggregate interest not to exceed in value four hundred dollars ($400) plus any unused. amount, of the exemption provided under paragraph (1), in any property.

(6) The debtor's aggregate interest, not to exceed seven hundred fifty dollars ($750) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value four thousand dollars ($4,000) in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent of the debtor.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive any of the following:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit.

(B) A veterans' benefit.

(C) A disability, illness, or unemployment benefit.

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(E) A payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless all of the following apply:

(i) That plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose.

(ii) The payment is on account of age or length of service.

(iii)) That plan or contract does not qualify under

Section 401(a), 403(a), 408(b), 408, or 409 of the Internal Revenue Code of 1954.

(11) The debtor's right to receive, or property that is traceable to, any of the following:

(A) An award under a crime victim's reparation law.

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(C) A payment under a life insurance contract, that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(D) A payment, not to exceed seven thousand five hundred dollar ($7500) on amount of personal bodily injury, not including pain and suffering of compensation for actual pecuniary loss, of the debtor or an individual for whom the debtor is a dependent.

(E) A payment in compensation of loss of future earnings of the debtor or an Individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

SEC. 2, The Legislature finds and declares that the amendment of Section 703.140 of the Code of Civil Procedure by Section I of this act pertaining to exemptions in bankruptcy is not a change in, but is declaratory of, existing law. The Legislature further finds and declares that the decision in In re Pladson, 164 B.R. 805 (N.D. Cal. 1993), holding that the homestead exemption Is not available in bankruptcy, is not a correct interpretation of California law. The Enforcement of Judgments Law provides exemptions for various forms of property, including homesteads, and contains a number of special procedural protections for special forms of property. It is not, and never has been, the intention of the Legislature to restrict any of the exemptions in bankruptcy because of technical language concerning the procedures for claiming exemptions in state money judgment enforcement proceedings under the Enforcement of Judgments Law. See, e.g.,

Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 CaL 1, Revision Comm'n Reports 2001, 2095-96 (1980); 1982 Creditors' Remedies Legislation, 16 Cal. L. Revision Comm'n Reports 1001, 1098-99 (1982).

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure proper implementation of the homestead exemption without delay, it is necessary that this act go into immediate effect.

*(Additions or changes indicated by underline; deletions by asterisk * * *)*